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No. 08-599

IN THE

Supreme Court of the United States

LAUREN BROWNING,
Petitioner,

v.

SOUTHWEST RESEARCH INSTITUTE,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in constructive discharge cases, specifically enumerated "relevant" or "aggravating" factors relied upon by the Third, Fifth, and Sixth Circuits may be the exclusive considerations in determining whether to grant judgment as a matter of law under Fed. R. Civ. P. 56 or whether, as in other circuits, district courts must review the evidence as a whole?

2. Does *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), holding that district courts must draw all reasonable inferences in favor of the nonmoving party, and may not make credibility determinations or weigh the evidence, apply to employment discrimination claims other than termination claims?

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are listed below. To Petitioner's knowledge, Southwest Research Institute has no parent companies or non-wholly owned subsidiaries.

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LAUREN BROWNING,
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SOUTHWEST RESEARCH INSTITUTE,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Lauren Browning prays for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on August 5, 2008.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is contained in the Appendix. *See* App. A. A copy of the Final Judgment of the United States District Court for the Western District of Texas is contained in the Appendix. *See* App. B. A copy of the Order Accepting Report and Recommendation of United States Magistrate Judge of United States District Court for the Western Division of Texas is contained in the

Appendix. *See* App. C. A copy of the Report and Recommendation of the United States Magistrate Judge of the United States District Court for the Western District of Texas is contained in the Appendix. *See* App. D. Excerpts relevant for the Court's review of this petition for certiorari are also contained in the Appendix. *See* App. E – J.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on August 5, 2008. Pursuant to this Court's Rule 13.1, this petition for writ of certiorari is timely because it is being filed within ninety days after entry of judgment.

STATUTES INVOLVED

This case involves gender-based constructive discharge, retaliation, and promotion discrimination under Title VII and the Equal Pay Act ("EPA"). Title VII states, in pertinent part:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex, . . .; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .

42 U.S.C. 2000e-2(a), and:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter . . . .

42 U.S.C. 2000e-3(a).

The EPA states in relevant part:

> It shall be unlawful for any person—
>
> > (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S. C. § 215(a)(3).

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Petitioner Lauren Browning filed her gender discrimination and retaliation complaint and jury demand on March 29, 2005. On October 6, 2006, the United States Magistrate for the Western District of Texas issued a Report and Recommendation that the district court grant summary judgment in favor of Southwest Research Institute (the "Institute"). On March 1, 2007, the district court adopted the magistrate's report and recommendation and granted the Institute's motion for summary judgment. Browning timely appealed to the United States Court of Ap-

peals for the Fifth Circuit on March 30, 2008. Following oral argument, a three-judge panel of the Fifth Circuit affirmed the judgment of the district court on August 5, 2008, holding, *inter alia*, that Petitioner failed to demonstrate a prima facie case of constructive discharge or retaliation and failed to demonstrate pretext as to her failure to promote claim.

B. Factual Background

Petitioner, Lauren Browning, Ph.D. ("Petitioner" or "Browning"), is a female geochemist who was formerly employed as a Research Scientist by Southwest Research Institute ("Respondent" or the "Institute") from 1998 until her constructive discharge in May 2004. At the Institute, Browning reported to manager English Pearcy. The president over Browning's division (known as the "Center") was Wes Patrick.

From the genesis of Browning's employment, the Institute paid Browning a lower salary than male Research Scientists, even those who lacked doctoral degrees and had less experience than Browning. Suspecting a pay inequality between herself and her male peers, Browning questioned her manager Pearcy in January 2001 as they discussed her annual performance review. Browning showed Pearcy an American Chemistry Society salary survey and pointed out a section stating that female scientists in her field earned less than their male counterparts. App. 51a. Browning asked Pearcy, "Is this what's happening to me?" Pearcy retorted in a hostile manner that she was "crazy if [she] thought that." App. 51a.

Browning reiterated her concerns about the pay inequality at every performance review thereafter, in or around January 2002, 2003, and 2004. The Insti-

tute took no action to remedy the pay disparities or to explain to Browning any justification for the disparities.

Immediately after Browning inquired about a gender-based pay disparity she began to experience badgering and harassment from Pearcy. Their theretofore good working relationship deteriorated as Pearcy began a pattern of personal and professional attacks against Browning. He began keeping a paper trail on Browning "documenting" any "negative" conduct by Browning. One of these hyperbolic notations led to his allegation in her performance review that Browning engaged in "gratuitous negative comments" about her colleagues. Pearcy alleged that Browning refused to participate in Institute projects. Her record of accomplishments for Respondent shows the opposite. App. 84a, 86a.

While seeking a salary commensurate to that of her male co-workers, Browning also sought a promotion to Senior Research Scientist, the next higher level in the career ladder. Although the Institute concedes that Browning's performance well exceeded its expectations for the Research Scientist level, it refused to promote her. Withholding the promotion was part of the Institute's pattern of retaliation against Browning for pursuing an answer about pay inequality. Because promotion was directly linked to an employee's performance review rating, the Institute was able to facially justify not promoting Browning by ensuring her performance ratings were never high enough to trigger promotion.

Pearcy completed Browning's performance reviews and recommended her performance rating. In the first performance review after Browning questioned Pearcy about gender-based pay inequality Pearcy in-

cluded allegations against Browning and used the (contested) allegations to lower her performance rating. Unlike Browning's reduced rating due to alleged "negative gratuitous comments," a male peer who had openly criticized his colleagues was not punished with a lower performance rating; he was promoted.

After January 2002, when Browning renewed her concerns regarding unequal pay and rank to Pearcy and the Center's management team, the Institute intensified its retaliatory conduct toward Browning. In or around February 2002, during her performance review meeting with Pearcy, Browning expressed concern about the inequity in her pay and treatment compared to the men working in the Center. Pearcy pointed to his door and replied that "if you don't think what we [management] are doing is fair, then there is the door." App. 58a.

A few months later, when Browning recorded work she did outside the traditional 8-to-5 workday,[1] Pearcy and Center President, Patrick, alleged that Browning had committed timecard fraud and threatened Browning that it was a federal felony offense.[2] They also forbid her to attend conferences or otherwise represent the Institute without prior authorization. This effectively destroyed Browning's ability to build new client relationships through networking

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[1] Recording work hours done outside the 8-to-5 workday was common, particularly when a Research-level or higher-level Scientist attended conferences or meetings during the day and then returned to the Institute to complete billable work.

[2] Pearcy and Patrick changed Browning's April 12, 2002 timecard, alleging that she had not worked all eight hours she reported. However, Pearcy admitted he had no proof that Browning had not worked all the hours she reported. App. 60a, 61a.

and hindered her collaboration on peer-reviewed articles and presentations—activities in which she had previously engaged to position the Institute favorably for obtaining contracts with new clients. Once again, Pearcy documented these instances as wrong-doing by Browning (even though the evidence reveals Browning's conduct complied with Institute policy) and used the allegations to downgrade her performance rating. Browning's male colleagues, on the other hand, suffered none of these restrictions, but were commended for their networking efforts.[3]

After Browning's January 2003 renewal of her unequal pay and rank concerns, Center President Wes Patrick confronted Browning in her office. When Browning told Patrick that her personnel file revealed what she had suspected all along—that her pay was significantly lower than any of the males'—Patrick threatened Browning's job saying that he had grounds to "terminate [her] employment for cause" and that "Texas is a right to work state." Patrick specifically referenced his and Pearcy's allegations against her of timecard fraud and Browning's participating in conferences without prior authorization (which was not required for male Research Scientists) as the basis for his "cause" to terminate her. These allegations were unfounded.

By the summer of 2003, the Institute's retaliatory conduct was a full-scale effort to force Browning to quit. In June 2003, a management administrator, Pat Mackin, accosted Browning about her travel ex-

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[3] The Institute did not downgrade a male colleague's performance review for work he performed outside his traditional role at the Institute. Respondent praised him but encouraged him to take care to "achieve a better balance between devotion to his career and attention to his personal health."

penditures. Shouting at her and pounding his fists on a desk, Mackin accused Browning of abusing the Institute's travel policies. In fact, Browning had submitted accurate cost estimates which, according to proper protocol, had been approved before she took the trip.

The Center's management also began actively looking for Browning's replacement. By July 2003, the Center opened a job requisition and began seeking a scientist with the same qualifications as Browning to do the exact work Browning performed for the Center. Because the Center's hiring approach allowed for new hires only to fill a vacated position, and because—unless Browning's employment was terminated—there was no vacant position to fill, a new hire would result in two employees performing Browning's work and an extra person on payroll. The Center's search for Browning's replacement continued until the Institute hired a new geochemist sometime in March 2004.

Despite the hostile response from the Institute,[4] Browning raised her unequal pay and rank concerns a fourth time in January 2004. On January 30, 2004, without warning—and without following the Center's normal protocol—Pearcy stripped Browning of her primary job responsibilities as a Principal Investigator. Pearcy testified that, unlike the normal "rotations" of employees out of Principal Investigator roles, he did not follow the normal protocol of conferring with the other Center management members before making, and executing, this removal decision. App. 63a, 67a, 68a.

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[4] The Institute took negative action against Browning in response to her first three inquiries.

After taking away Browning's Principal Investigator responsibilities, Pearcy successfully badgered, harassed, and humiliated Browning in order to devastate her morale and convince her to resign. He frequently reminded her that as promotions go he believed Browning had a "downward trending" performance, he viewed her as starting from a negative position, and told her that it would likely take years for her to turn her chances around. The "downward trending" performance ratings Pearcy assigned to Browning did not reflect her exceptional technical work for the Center—a fact that the Institute has not denied. App. 63a, 69a, 77a, 80a, 84a, 89a. Instead, these so-called "downward trending" performance ratings were based on Pearcy's own false allegations.

By March 2004, Browning had given the Institute years to alleviate or explain her unequal pay. Instead Center management penalized, falsely accused, and marginalized Browning. Now, with her primary job responsibilities taken away, Browning was at a dead-end in her job. Doctor Browning had hit the glass ceiling and she knew it. When she complained she was shown the door. She knew that the Institute had found her replacement (who would start in June 2004). After enduring Pearcy's relentless badgering about the hopelessness of her attaining equal pay or a promotion at the Institute Browning had no other options; she gave her notice and resigned on May 21, 2004.

REASONS FOR GRANTING THE WRIT

What the Fifth Circuit is doing creates a split among the circuits in two ways and departs from the approach to summary judgment this Court requires in *Reeves v. Sanderson Plumbing Products, Inc.*, 530

U.S. 133 (2000). In *Browning*, the Fifth Circuit correctly stated the standard for constructive discharge thus: "we ask whether 'working conditions [became] so intolerable that a reasonable person in the employee's position would have felt compelled to resign.'" App. 17a-18a, citing cases. Starting at the right place, the Fifth Circuit uses an approach that is doubly wrong: (1) The Fifth Circuit uses a rigid check list of "aggravating factors." If a factor is not listed, or if evidence of intolerable working conditions do not fit a listed factor, the evidence vanishes. (2) The Fifth Circuit weighs and discounts evidence that, particularly when combined with other bad treatment, would make a reasonable person in the employee's position feel compelled to resign. The standard requires the fact-finder to look at all the evidence through the eyes of a reasonable person in the employee's position. The combination of (1) using the check list (rejecting bad treatment that does not neatly fit the list) and (2) weighing and discounting evidence means that evidence presented to the Fifth Circuit in constructive discharge cases runs through a judge-made filter not used by other circuits. Further, this filter is impermissible under *Reeves*.

Three reasons exist for granting certiorari and they fit together. First, the Fifth Circuit, along with the Third and Sixth Circuits, follow a judicially created approach to reviewing constructive discharge evidence that is at odds with the Second, Ninth, Tenth, and D.C. Circuits and departs from the fundamental standard that when making summary judgment determinations, a district court must consider the evidence as a whole. The Third, Fifth, and Sixth Circuits use a check list approach that conflicts with this Court's holding in *Burlington Northern & Santa Fe*

Ry. Co. v. White, 548 U.S. 53 (2006) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and results in significant constructive discharge evidence being discounted, really treated as irrelevant, because it does not neatly fit into one of the categories on the check list. The majority of circuits properly review the totality of the evidence. The Supreme Court should resolve this split among the circuits.

Second, in denial of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) the Fifth Circuit habitually weighs evidence, makes credibility determinations, and discounts the non-movant's evidence in employment discrimination cases that do not involve an outright discharge or termination. Under *Reeves*, the weighing of evidence and credibility determinations are properly left to the jury. Yet, post-*Reeves*, nothing has changed in the Fifth Circuit in constructive discharge cases and discrimination cases where there is no outright termination. This circuit has so far departed from the usual and accepted course of judicial proceedings—in short, *stare decisis*—as to call for an exercise of this Court's supervisory power.

Third, because other circuits do properly apply *Reeves* to discrimination claims that do not involve an outright discharge or termination, the Fifth Circuit's pre-*Reeves* approach creates a split in the circuits. The Supreme Court should resolve this split by rejecting the Fifth Circuit's summary judgment approach.

A. The Court Should Grant Certiorari to Resolve a Split in the Circuits Regarding Whether Courts Should Consider the Evidence as a Whole When Deciding

Constructive Discharge Cases, or Whether Courts May Consider Only Certain Enumerated "Aggravating" Factors

The Third, Fifth, and Sixth Circuits all rely on explicitly enumerated "aggravating" or "relevant" factors to determine whether an employee was constructively discharged. These circuits sometimes state that these factors are not exhaustive. However, opinions issued in the Third, Fifth, and Sixth Circuits reveal that, in practice, their courts strictly adhere to a specific "check list" of factors.[5] As a result, the courts in these circuits commonly reject evidence of circumstances that do not precisely conform to the

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[5] *Stremple v. Nicholson*, No. 06-3807, 2008 WL 3919376, at *3 (3rd Cir. Aug. 27, 2008) (slip op.) (holding that virtually all factors that should be considered in a constructive discharge case were present in Stremple's case); *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167-68 (3d Cir. 2001) (granting summary judgment where plaintiff did not demonstrate any of the factors in the *Clowes* check list); *Konstantopoulos*, 112 F.3d at 719 n.2 (3d Cir. 1997) ("absence of strong evidence for any of the factors supported a finding that the plaintiff was not constructively discharged."); *Browning v. Southwest Research Inst.*, No. 07-50434, 2008 WL 3009894 (5th Cir. Aug. 5, 2008); *Aryain v. Wal-Mart Stores*, 534 F.3d 473, 481 (5th Cir. 2008) (analysis of evidence tracks each item on check list of "aggravating factors."); *Reznick v. Assoc'd Orthopedics & Sports Medicine, P.A.*, 104 Fed. Appx. 387, 392-93 (5th Cir. 2004) (same); *Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 451 (6th Cir. 2005) (analysis of evidence tracks check list of "aggravating factors"); *Kinamore v. EPB Elec. Utility*, 92 Fed. Appx. 197, 205 (6th Cir. 2004) (no finding of constructive discharge because plaintiff's evidence did not implicate the *Logan* [aggravating] factors) *Logan v. Denny's, Inc.*, 259 F.3d 558, 570-71 (6th Cir. 2001) (analysis of evidence tracks check list of Fifth Circuit's "aggravating factors," which the Sixth Circuit expressly adopts in full).

aggravating factors enumerated in the check list but which, taken together, would cause a reasonable person to abandon the security of employment and resign. This approach conflicts with that of the Second, Ninth, Tenth, and D.C. Circuits, which consider the evidence as a whole in determining whether an employee has been constructively discharged.

The check lists began as a useful guide for the courts when considering evidence in constructive discharge cases. *Barrow v. New Orleans Steamship Assoc.*, 10 F.3d 292, 297 (5th Cir. 1997); *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 719 n.2 (3d Cir. 1997) (Alito, J.). Over time, however, the circuits' lists of "aggravating factors" morphed into a mechanistic check list to which all constructive discharge evidence must conform if it is to be considered as supporting a constructive discharge finding.[6]

A showing of constructive discharge is but one element in a plaintiff's prima facie discrimination case. *See Reznick*, 104 Fed. Appx. at 392. However, the narrow approach used in the Third, Fifth, and Sixth Circuits heightens the claimant's prima facie burden by requiring a showing of specific kinds of evidence in order to meet the adverse-action element of that prima facie case. This heightened evidentiary requirement conflicts with long-standing precedent that establishing a prima facie case of disparate

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[6] *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir. 2000) (affirming summary judgment for employer because plaintiff's evidence did not demonstrate harassment or humiliation even though at least two other factors clearly met); *Reznick v. Assoc'd Orthopedics & Sports Medicine, P.A.*, 104 Fed. Appx. 387, 392-93 (5th Cir. 2004) ("[aggravating] factors must be considered") (emphasis added); *Browning v. Southwest Research Inst.*, No. 07-50434, 2008 WL 3009894 (5th Cir. Aug. 5, 2008).

treatment is not onerous. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). These circuits' check list approach is also contrary to *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), which held that the application of the *McDonnell Douglas* framework "was never intended to be rigid, mechanized, or ritualistic." *Id.* A check list like those used in the Third, Fifth, and Sixth Circuits leads a court to view the evidence through a filter that recognizes only certain kinds of evidence. This rigid and mechanical device substitutes for, and prevents, consideration of the evidence as a whole.

Because constructive discharge is typically based on an accumulation of adverse conditions, or pattern of discriminatory treatment,[7] it often differs from employment discrimination cases in which there is one pivotal tangible adverse action. Rather, due to the cumulative nature of circumstances creating the intolerable working conditions, constructive discharge shares much in common with many retaliation cases in which there is a pattern of materially adverse conduct. As in retaliation, when reviewing evidence of constructive discharge the courts must consider the "particular circumstances" and the "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[8] *Burlington Northern*, 548 U.S. at 68.

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[7] *See Chertkova v. Connecticut Gen. Life Ins. Co.*, 92 F.3d 81, 90 (2d Cir. 1996).

[8] Petitioner does not advocate that the "materially adverse" standard articulated in *Burlington Northern* be applied to constructive discharge cases. However, given the cumulative nature of constructive discharge evidence, consideration must be given to the social and career consequences of the employer's

The consequences of an employer's adverse conduct toward an employee, and whether those consequences would be a factor leading a reasonable person to resign, will depend heavily upon the unique characteristics of the plaintiff's workplace. The Third, Fifth, and Sixth Circuits' check list approach fails to take context into account.

Even circuits using the check list approach do not agree upon which employer actions to include on the check list. The Fifth and Sixth Circuits include the following relevant or "aggravating factors" on their check list of considerations:

Whether an employee:

(1) suffered a demotion,

(2) experienced a reduction in salary,

(3) experienced a reduction in job responsibilities,

(4) was reassigned to menial or degrading work,

(5) was reassigned to work under a younger supervisor,

(6) suffered badgering, harassment or humiliation by the employer calculated to encourage the employee's resignation, or

(7) received offers of early retirement on terms that would leave the employee worse off regardless of acceptance.

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actions in determining whether the work conditions have become so intolerable as to compel a reasonable person to resign. The Third, Fifth, and Sixth Circuits' check list approach literally rules out a finding of constructive discharge when a Black or female hits the glass ceiling.

Barrow, 10 F.3d at 297. By contrast, the Third Circuit also takes into account unsatisfactory job evaluations and threats of discharge, but does not consider reduction in job responsibilities or reassignment to menial or degrading work or to a younger supervisor (absent involuntary transfer to a different (less desirable) position). *See Stremple v. Nicholson*, 2008 WL 3919376, at *3 (3d Cir. Aug. 27, 2008) (slip op.) (citing *Suders v. Easton*, 325 F.3d 432, 445 (3d Cir. 2002) vacated on other grounds, *Penn State Police v. Suders*, 542 U.S. 129 (2004)).

These circuits' disagreement about what constitutes an "aggravating factor" highlights the flaws inherent in the check list approach. What may be considered an "aggravating factor," or a factor that could reasonably lead to resignation, is situational, depending upon "a constellation of surrounding circumstances, expectations, and relationships."[9] Therefore, it is impossible and wrong for a court to pre-judge what constitutes an "aggravating factor." There can be no reliable check list that addresses every possible factor that would lead a reasonable person to feel compelled to resign.

Instead of requiring plaintiffs to establish a check list of adverse employment actions to survive summary judgment in constructive discharge cases, the Second, Ninth, Tenth, and D.C. Circuits use a better approach. These circuits examine the evidence as a whole to determine whether an employee was constructively discharged.

The Tenth and D.C. Circuits have not adopted a check list approach, but do note that a showing of constructive discharge requires a showing of "certain

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[9] *See Burlington Northern*, 548 U.S. at 68.

aggravating factors" without enumerating specific factors. *Fisher v. Forestwood Co.*, 525 F.3d 972, 981 (10th Cir. 2008) (citing "totality of the circumstances" approach to evidence); *Greer v. Paulson*, 505 F.3d 1306, 1320 (D.C. Cir. 2007) (citing *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Dir. 1997)). However, opinions issued by these circuits reflect that their courts have not pre-determined what constitutes an aggravating factor, but review the evidence as a whole to determine whether a reasonable person would feel compelled to resign. *See EEOC v. PVNF, LLC*, 487 F.3d 790, 806 (10th Cir. 2007); *Yearous v. Niobrabra County Mem'l Hosp*, 128 F.3d 1351, 1356 (10th Cir. 1997) (constructive discharge under 42 U.S.C. § 1983).

The Ninth Circuit requires "some aggravating factors, such as a continuous pattern of discriminatory treatment." *Schnidrig v. Colombia Machine, Inc.*, 80 F.3d 1406, 1412 (9th Cir. 1996). Despite the Ninth Circuit's use of the term "aggravating factors," this circuit also follows a "totality of the circumstances" approach—one that looks to all the facts and circumstances surrounding the employee's decision that her working conditions have become so intolerable that resignation is unavoidable. *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987).

The Second Circuit also follows a constructive discharge standard which logically flows from the *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 n.2 (1986) opinion that district courts must view the record as a whole. *See, e.g., Terry v. Ashcroft*, 336 F.3d 128, 152 (2d Cir. 2003) ("working conditions are intolerable when, viewed as a whole, they are 'so difficult or unpleasant that a reasonable person in the employee's

shoes would have felt compelled to resign.'") (emphasis added).

The Second, Ninth, Tenth, and D.C. Circuits do not pre-determine what constitutes an "aggravating factor." Instead, consistent with *Reeves v. Sanderson Plumbing Products, Inc.*,[10] these circuits review the unique facts of each case and, viewing the evidence as a whole, make case-specific determinations as to whether factors exist that would compel a reasonable person to resign. *See, e.g., Douglas v. Orkin Exterminating Co.*, 215 F.3d 1336, 2000 WL 667982, at *4 (10th Cir. 2000) (whether an incident or event constitutes an "aggravating factor" depends on individual facts of the case); *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) (determination of constructive discharge is normally a factual question left to the trier of fact"); *Veitch v. England*, 471 F.3d 124, 130 (D.C. Cir. 2006) ("'aggravating factors' are those aspects of a discriminatory work environment that, by making the workplace so disagreeable, prevent the reasonable person from seeking remediation on the job.") (citing *Mungin*, 116 F.3d at 1558).

The instant case demonstrates that the "totality of the circumstances" or "evidence as a whole" approach used by the Second, Ninth, Tenth, and D.C. Circuits cannot be reconciled with the "check list" approach used by the Third, Fifth, and Sixth Circuits. Here, the Fifth Circuit applied its exclusive check list of aggravating factors to Browning's case and affirmed summary judgment while discounting or disregarding evidence that did not conform to the Fifth Circuit's specifically enumerated "aggravating factors."[11] Un-

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[10] 530 U.S. 133 (2000).

[11] Using the check list itself is contrary to *Reeves*. See

der the "evidence as a whole" approach applied in other circuits,[12] the analysis would have easily resulted in denial of the employer's summary judgment motion.

With a one page analysis, the *Browning* panel used its exclusive check list of aggravating factors, listing seven factors, without a hint that other evidence might matter. App. 17a-18a. The *Browning* panel noted that Browning was not demoted (not surprising, since her glass ceiling complaint was that she could not get pay equal to the men and she could not get promoted), that she got salary increases, was not reassigned to menial work, was not reassigned to work under a younger supervisor (a factor designed for ADEA cases, not sex discrimination cases), and was not offered early retirement or less favorable employment terms (disregarding Browning's evidence that she was stripped of her most important job responsibilities). *Id.* The effect of expressly nay-saying six of the seven check list items was to imply that Browning had some evidence of one (check list number 6—"badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation"). Without mentioning her evidence, the panel dismissed it as "allegedly retaliatory treatment that we have discussed above" and then acted as the fact-finder, "we hold that Browning's working conditions were not so intolerable that a reasonable person

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argument "B" below.

[12] Even in another circuit using the aggravating factors check list a reversal of the summary judgment finding in Respondent's favor could have easily been reached because Browning's evidence raised fact issues regarding two out of seven listed factors. *See Saroli*, 405 F.3d at 452.

in her situation would have felt compelled to resign." *Id.*

The Third, Fifth, and Sixth Circuits' by-the-list approach fails to recognize that the "significance of any given [adverse act by an employer] will often depend upon the particular circumstances. Context matters." *See Burlington*, 548 U.S. at 69. When these courts substitute a check list of factors for a thoughtful analysis of the "evidence as a whole" or "totality of the circumstances" context is lost. This Court stated in *Burlington*:

> [A] legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an act that would be immaterial in some situations is material in others.

Id. These circuits' check list approach replaces the traditional constructive discharge standard with a narrow and exclusive list of specific prohibited acts. As the *Burlington* opinion suggested, the great risk of such an approach is that a court will not see the forest for the trees. In *Browning*, among all the other evidence, Browning was literally shown the door and specifically told by her manager, "if you don't think what we are doing is fair, then there is the door."[13] A jury could find that a reasonable person would consider that as a direct invitation to resign. But because it did not fit within the specific prohibited acts on the Fifth Circuit's check list, the panel rejected this powerful evidence.

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[13] This statement was made by her manager during a performance review conversation in which Browning again raised her concerns about unequal pay. Context matters.

Petitioner respectfully requests that this Court resolve the split in the circuits and support its holding in *Burlington* by rejecting the narrow and exclusive lists of factors considered by the Third, Fifth, and Sixth Circuits in determining constructive discharge claims and approving the "evidence as a whole" approach used by the Second, Ninth, Tenth, and D.C. Circuits.

B. The Court Should Grant Certiorari Because the Fifth Circuit's Non-Application of *Reeves v. Sanderson Plumbing Products, Inc.* Departs So Far from the Accepted and Usual Course of Judicial Proceedings That This Court Should Exercise Its Supervisory Power

Before and after this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Fifth Circuit has acted as a *de facto* jury in reviewing summary judgment rulings. Its habit of weighing and discounting evidence has continued despite this Court's landmark *Reeves* decision.

1. Prior to *Reeves* the Fifth Circuit Weighed and Discounted Evidence in Employment Discrimination Cases Involving Both Outright Terminations and Constructive Terminations

The Fifth Circuit's *Reeves* opinion[14] involved an outright termination of the employee, Reeves. In this ADEA case, Reeves presented evidence that: (1) the employer, Sanderson, had provided inconsistent reasons for his discharge, (2) Reeves had not created

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[14] *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688 (5th Cir. 1999).

false or inaccurate records, as Sanderson charged and which it used as a reason for Reeves' termination, (3) Reeves received disparate treatment from a supervisor, (4) Reeves encountered age-related comments from the decision-maker, (5) Reeves was put on a probation plan when a younger employee with the same performance issues was not, (6) he was singled out for scrutiny, and (7) other employees were accused of inaccurate record keeping but were not discharged. *Id.* at 693-94. Despite this evidence, the Fifth Circuit affirmed judgment for Sanderson. The Fifth Circuit discounted evidence of the inconsistent reasons as "hardly . . . mendacious." *Id.* at 693. This Court specifically found that in dismissing the age-related comments because they "were not made in the direct context of Reeves' termination," the Fifth Circuit discredited Reeves' evidence that the decision-maker was the person who had made age-related comments. *Reeves*, 530 U.S. at 152. Moreover, this Court held that the Fifth Circuit "impermissibly substituted its judgment concerning the weight of the evidence for the jury's" by giving greater weight to evidence that Sanderson had retained other managers over 50 years of age. *Id.* at 153.

The Fifth Circuit's decision in *McKethan v. Texas Farm Bureau*, 996 F.2d 734 (5th Cir. 1993), is an example of how, prior to *Reeves*, the Fifth Circuit weighed and discounted the evidence in constructive discharge cases. In McKethan's ADEA claim, McKethan, an insurance agency district manager, was invited to be recognized at an annual state-wide awards ceremony. Approximately 700 people were in attendance, including insurance sales agents, agency managers, district managers like himself, regional sales manager, associate state sales managers, and the state sales manager. But when McKethan's turn

for recognition came, the regional sales manager announcing the awards berated him. He told McKethan, "sit down, you don't have anything, you haven't done anything to be recognized for." The regional sales manager went on to say that McKethan "never had a master agent[15] and never would have one." With his career publicly undermined, McKethan soon afterward told his regional sales manager (one of the announcers) that he intended to retire in about a year. McKethan's regional sales manager did not ask him to stay, nor did any other officer of the company. Ignoring the impact on McKethan's career of the employer's very public display of no confidence, the Fifth Circuit affirmed summary judgment. It weighed and minimized the evidence, finding that McKethan suffered nothing more than embarrassment.

2. After *Reeves*, the Fifth Circuit Adheres to Pre-*Reeves* Analysis in Constructive Discharge Cases

Post-*Reeves*, in constructive discharge cases, the Fifth Circuit still weighs the evidence, makes credibility determinations, draws inferences for the nonmovant, and discounts movant's evidence. *Browning* is one of the latest of many post-*Reeves* constructive discharge decisions where the Fifth Circuit's approach is completely unaffected by the requirements of this Court in *Reeves*.

Review of the panel decision in *Browning* instantly reveals that *Reeves* has no impact on the Fifth Circuit approach to a constructive discharge claim. The panel states unabashedly: "'Mere harassment, alone, is insufficient; rather the plaintiff must show 'aggra-

[15] An agent in a district manager's district who is recognized as doing an outstanding job.

vating factors' to justify departure.'" App. 17a, *citing Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 331 (5th Cir. 2004). Under *Reeves* (and *Burlington*—context matters), a fact-finder does the weighing and discounting. The panel calls it "mere harassment," but the word harassment is literally part of factor 6 on the Fifth Circuit check list. The Fifth Circuit holds that no amount of "mere harassment" is enough to meet the standard. In other words, a reasonable person could be so harassed that she felt compelled to resign, but, as a matter of law, determined by the judges and not the jury, the evidence is meaningless. An employer could literally tell an employee—you will never be promoted, you have hit the ceiling, but since this is not a demotion, the judge may freely ignore this evidence. *Reeves* says that judges must leave to the jury evidence that relates to the issue in question (here, whether a reasonable person in the employee's position would have felt compelled to resign).

The *Browning* opinion is fraught with instances where the Fifth Circuit departed from *Reeves* and took it upon itself to weigh the evidence and make credibility determinations.[16] Browning presented evidence that the Institute failed to promote her, ostensibly due to performance ratings that did not trigger promotion to the next step in the career ladder. However, Browning's evidence also revealed that (1) Pearcy, the decision-maker who was already retaliating against her in other ways, was the individual responsible for completing Browning's reviews and

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[16] The Fifth Circuit's pre-*Reeves* analysis affected not only Petitioner's constructive discharge claim, but also her retaliation and failure to promote claims, for which she also seeks this Court's review.

recommending her performance ratings; (2) Browning demonstrated excellent technical work, for which she was commended by her client, the NRC; (3) Pearcy downgraded Browning's overall performance ratings based on unfounded allegations of wrong-doing; (4) the Institute did not downgrade males for deficiencies that were similar or more severe than Browning's; (5) the Institute promoted a male colleague who had similar or more severe deficiencies than Browning's.

Applying a pre-*Reeves* analysis, the Fifth Circuit discounted the evidence that the Institute gave Browning artificially low performance ratings and that these low ratings were based on unfounded allegations by Pearcy. App. 81a, 85a, 90a. The Fifth Circuit gave credence to the allegations Browning failed to follow Institute procedures, made an unauthorized business trip, failed to accurately report her time, and was reluctant to participate in certain Institute initiatives. In doing so, it discounted or discredited evidence that Pearcy admitted there was no proof that Browning failed to accurately report her time. App. 60a, 61a. It ignored evidence revealing the falsity of Pearcy's other allegations in the performance evaluations. It weighed the evidence regarding the Institute's stricter judgment of Browning's performance compared to male employees. The Fifth Circuit also discounted or discredited evidence that a male scientist [Hill] was promoted to the next higher level in the career ladder, while Browning was not. Finally, the Fifth Circuit improperly required evidence that the Institute's conduct was openly gender-motivated. App. 12a-13a.

The Fifth Circuit noted that Browning's strongest evidence of retaliation was its reduction of her job responsibilities when Pearcy stripped Browning of her

primary job responsibilities on January 30, 2004. However, the Browning court weighed the evidence and classified it as a "seemingly normal rotation out of the Principal Investigator position." App. 15a. (emphasis added). The Fifth Circuit discounted Pearcy's testimony that he did not follow the protocol required for a "normal rotation." App. 63a, 67a, 68a. It discounted as well the notes Browning took of her January 30, 2004 conversation with Pearcy, which indicate Pearcy was removing her from the principal investigator ("P.I.") role because she took too much credit for work on the project or because he had lost confidence in her (despite the note on her contemporary performance review that the client commended her for her work). *See* App. 57a, 89a.

The Fifth Circuit concluded that Browning's retaliation and constructive discharge claim merely consisted of allegations of badgering, harassing, and humiliation. App. 15a, 17a-18a. Browning presented evidence that: (1) when Browning initially raised her gender-based unequal pay concerns in 2001 Pearcy literally responded, "[you are] crazy if [you think] that." App. 51a; (2) she never encountered such harassment or badgering prior to her first complaint of unequal pay. *See* App. 77a-78a; (3) in response to Browning's early 2002 unequal pay concern, Pearcy told her "if you don't think what we are doing is fair, then there is the door" and pointed to his door. App. 58a; (4) the Institute's retaliatory behavior increased each year after Browning renewed her unequal pay concerns; (5) Pearcy and the Center's President, Wes Patrick, falsely accused her of a federal felony offense by alleging timecard fraud; (6) Pearcy and Patrick prohibited her from representing the Institute at conferences without prior approval from them, while male scientist did not have this limitation; (7) Pearcy

responded to Browning's concerns about possible ethics violations at closed meetings by responding, "I suggest that you avail yoursel[f] of the free psychiatric services provided by the Institute." App. 59a; (8) after Browning's third unequal pay inquiry, the Center's President threatened Browning's job, allegedly "for cause"; and (9) the "cause" Patrick referenced in his threat was based on unfounded allegations. In pre-*Reeves* fashion, the Fifth Circuit weighed this evidence in the Institute's favor and concluded they were nothing but "petty slights" or "minor annoyances." App. 16a. In another instance of pre-*Reeves* analysis, the *Browning* decision treated evidence from several different incidents[17] as one, thereby diminishing their impact. App. 16a.

Moreover, the Fifth Circuit concluded that Browning "presents nothing but conclusory allegations" that the Institute suppressed her performance reviews, subjected her to extra scrutiny, or attempted to hire her replacement. App. 16a-17a. In addition to ignoring the evidence of performance rating suppression discussed above, in so holding, the Fifth Circuit discredited or discounted Browning's evidence regarding an encounter in which a Center administrator confronted Browning in a physically threatening manner over unfounded allegations that Browning had not followed Institute travel policies. It also discounted Browning's evidence that in addition to having to get pre-authorization to attend conferences, all of Browning travel requests were subject to an extra layer of scrutiny (by Mackin as well as the Center's management) to which male employees were not subject. With respect to the Institute hiring Brown-

[17] These incidents are identified as numbers 3, 7, and 8 in the paragraph above.

ing's replacement, the Fifth Circuit discounted evidence that the Center's hiring policy prevented it from hiring a new employee unless there was a vacancy to fill—and that the new hire was a geochemist intended to perform the same work Browning had been performing since 1998.

The evidence, taken as a whole, shows a cumulative pattern of adverse conduct by the Institute toward Browning after she voiced a wage discrimination complaint. A reasonable person, a female Ph.D. scientist, who found herself certainly hitting the glass ceiling, hitting it hard, and being shown the door by her male management could reasonably conclude that her job situation was intolerable and feel compelled to resign. The Fifth Circuit's method of filtering Dr. Browning's evidence prevents her evidence from coming to bear on the constructive discharge standard. Other circuits, ones that consider the totality of the evidence, ones that permit evidence that does not fit the check list, ones that will view Dr. Browning's evidence in the light most favorable to her claim, will not permit summary judgment with such glass-ceiling evidence. The Fifth Circuit approach presents a split in the circuits and a departure from *Reeves* that this Court should address.

The Fifth Circuit also consistently applies a pre-*Reeves* analysis in numerous other post-*Reeves* cases. *See, e.g., Arora v. Starwood Hotels & Resorts Worldwide, Inc.*, No. 08-10344, 2008 WL 4410626 (5th Cir. Sept. 30, 2008) (discounting plaintiff's deposition and declaration testimony in its entirety and finding plaintiff did not make prima facie case of age, race, or national origin discrimination because one younger, Caucasian employee was also terminated and among defendant's remaining employees was one Indian

employee who was near plaintiff's age); *Bugos v. Ricoh Corp.*, No. 07-20757, 2008 WL 3876548, at *4 (5th Cir. Aug. 21, 2008) (discounting multiple witnesses' testimony regarding supervisor's preferential treatment of female employees as "subjective beliefs," discounting evidence that reasons for termination were false, dismissing *Reeves* by finding gender-related remarks not probative because remarks not made in direct context of termination); *Mire v. Texas Plumbing Supply Co.*, No. 07-20738, 2008 WL 2704573, at *5 (5th Cir. Jul. 10, 2008) (finding evidence of plaintiff's bonuses based on satisfactory performance and lack of documentation regarding alleged performance problems did not establish pretext where employer's stated reason for termination was poor performance); *Reznick v. Associated Orthopedics & Sport Medicine, P.A.*, 104 Fed. Appx. 387 (5th Cir. 2004) (discussed below); *Jackson v. The Univ. of Texas M.D. Anderson Cancer Center*, 54 Fed. Appx. 404, 2002 WL 31687699 (5th Cir. 2002) (discussed below).

In *Jackson v. The Univ. of Texas M.D. Anderson Cancer Center*, 54 Fed. Appx. 404, 2002 WL 31687699 (5th Cir. 2002), Jackson, a black female doctor, presented evidence that: (1) she was paid $150,000 per annum, when the salary at which she had been hired was $160,000; (2) she was not appointed to a tenure-track position as promised, but given a one-year non-renewable contract; (3) she was prohibited from pursing a complementary independent practice, although Caucasian male doctors could do so; (4) the employer had prepared a memo discussing a plan to hire Jackson on a temporary basis until a white male physician could achieve the required training to assume her position; (5) Jackson was not provided adequate support staff; and (6) the employer reduced Jackson's responsibilities. *Id.* at *1, *5-6.

The Fifth Circuit weighed and discounted this evidence and then held that (1) the $10,000 difference in promised and actual salary did not constitute a reduction in salary since the employer had never paid Jackson at the $160,000 rate and therefore this was not an aggravating factor; (2) failure to receive a tenure-track position may be an example of disparate treatment but it is not an aggravating factor; (3) the inability to pursue a private surgery practice may be disparate treatment but it is not an aggravating factor; (4) evidence that the employer intended to replace Jackson with a newly trained white male physician is not an aggravating factor; (5) because lack of proper staff does not constitute a demotion it is not an aggravating factor; (6) a change in job responsibilities is not an aggravating factor. *Id.* at *5-6. The Fifth Circuit in *Jackson* both adhered to its rigid, judge-made check list and weighed the evidence itself (not leaving this to the jury), finding that the working conditions were not so intolerable that a reasonable person in Doctor Jackson's position would have felt compelled to resign.

The Fifth Circuit also used a pre-*Reeves* approach in *Reznick v. Associated Orthopedics & Sport Medicine, P.A.*, 104 Fed. Appx. 387 (5th Cir. 2004). In *Reznick*, the plaintiff (a female doctor) presented evidence that: (1) her supervisor subjected her to crude, sexist comments; (2) her supervisor told salesmen who worked with the orthopedic practice that Reznick would receive advertising "when she gets laid"; (3) Reznick was paid substantially less than a recently hired male orthopedic specialist (Schwartz); (4) Reznick was denied advertising while Schwartz received an open house to announce his practice; (5) the employer ("AOSM") decided Reznick would not be made a partner; (6) Reznick had to share an assis-

tant with another employee while Schwartz had his own assistant; (7) AOSM created a financial arrangement whereby Schwartz was referred patients but Reznick was not; and (8) AOSM's management excluded Reznick from multiple professional opportunities and opportunities to network with management and impact the practice's business decisions.

Despite all this evidence recounting numerous kinds of adverse conduct taken by AOSM toward Reznick, the Fifth Circuit held that "the only [aggravating] factor relevant to Reznick's claim of constructive discharge is . . . 'badgering, harassment or humiliation by the employer calculated to encourage the employee's resignation.'" *Id.* at 393 (emphasis added). The Fifth Circuit's check list approach worked in tandem with its pre-*Reeves* approach of weighing the evidence, discounting evidence that did not fit an accepted "aggravating factor," and finding that the working conditions were not so intolerable that a reasonable person in Doctor Reznick's position would have felt compelled to resign.

As shown above, the Fifth Circuit's departure from the summary judgment approach required by *Reeves* is grounds for this Court to exercise its supervisory power. This Court should grant certiorari to rectify the Fifth Circuit's departure from *Reeves*, and ensure that *Reeves* is applied in the Fifth Circuit.

C. The Fifth Circuit's Post-*Reeves* Approach to Non-Outright Termination Employment Discrimination Claims Causes a Split in the Circuits

Following *Reeves*, other circuits have properly applied the *Reeves* analysis of summary judgment to all employment discrimination cases. In contrast, as

discussed above, the Fifth Circuit fails to apply the *Reeves* analysis to cases other than those involving an outright termination decision.

In *Terry v. Ashcroft*, 336 F.3d 128 (2d Cir. 2003), the Second Circuit applied *Reeves* in reviewing a decision granting summary judgment for the employer on Terry's retaliation, hostile work environment, and constructive discharge claims. The Second Circuit viewed the record as a whole and drew reasonable inferences in favor of the non-movant, Terry. For instance, the Second Circuit pointed out that it was the employer's policy to issue vehicles for persons on full duty, but evidence revealed the employer continued to suspend Terry from using a vehicle even after Terry was returned to full-duty status. *Id.* at 145. It also found that the many instances of retaliation, taken together, were not as the employer alleged, "sporadic and isolated events," but were, in fact, sufficient to preclude summary judgment as to Terry's hostile work environment and constructive discharge claims. *Id.* at 149-50, 152.

The Seventh Circuit, in *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781 (7th Cir. 2007) used a *Reeves* approach in reviewing summary judgment granted to the employer on Boumehdi's sexual harassment, constructive discharge, disparate treatment, retaliation, and equal pay act claims. In a situation much like Browning's, Boumehdi challenged her employer's refusal to give her a raise. The employer reasoned that raises were denied to employees receiving less than a particular performance review score. *Id.* at 792. The Seventh Circuit, properly viewing the evidence as a whole and drawing reasonable inferences in the non-movant's favor, noted that Boumehdi's alleged harasser was the "person responsible for the (possibly

retaliatory) negative performance review." *Id.* The Seventh Circuit rejected the notion that the employer's rationale constituted a legitimate reason for denying a raise and reversed summary judgment. *Id.*

These cases illustrate a split in the circuits, for which the Supreme Court should grant certiorari to resolve.

CONCLUSION

For all the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed August 5, 2008]

No. 07-50434

LAUREN BROWNING
Plaintiff - Appellant

v.

SOUTHWEST RESEARCH INSTITUTE
Defendant - Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:05-CV-245

Before JONES, *Chief Judge*, and GARWOOD and JOLLY, *Circuit Judges* E. GRADY JOLLY, *Circuit Judge*:*

Lauren Browning appeals the summary judgment dismissal of her wage discrimination, failure to promote, retaliation, and constructive discharge claims based on Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and of her wage discrimination and retaliation claims based on the Equal Pay Act ("EPA"), 29 U.S.C. §§ 206(d), 215(a)(3). We AFFIRM.

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

I.

Lauren Browning was employed by the Southwest Research Institute ("the Institute") from December 7, 1998, to May 21, 2004. She was initially hired as a one-year contract employee in the Institute's Center for Nuclear Waste Regulatory Analyses.[1] This limited-term contract was extended in December 1999, and Browning was retained as a Research Scientist on a regular basis beginning October 14, 2000.[2] On May 10, 2004, Browning resigned from her position with the Institute. Her resignation took effect on May 21.

It is undisputed that Browning was a productive and valuable employee. Her performance evaluations, the testimony of her supervisors, and her accomplishments while employed at the Institute reflect this fact. What is disputed is whether, despite her abilities, the Institute discriminated against Browning in the terms of her employment and retaliated against her in response to her complaints about such alleged discrimination. Browning alleges that the Institute discriminated against her because of her gender by paying her less than male employees with

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[1] The Institute is a non-profit institution that conducts broad-based scientific and engineering research, development, analysis, and exploration across many disciplines. The Institute is organized into divisions, with each division handling a distinct area of research or analysis. During the period of Browning's employment, Division 20, the Center for Nuclear Waste Regulatory Analysis, was devoted exclusively to projects sponsored by the U.S. Nuclear Regulatory Commission.

[2] The Institute's technical staff is organized progressively along the following career ladder: Scientists, Research Scientists, Senior Research Scientists, Principal Scientists, Staff Scientists, and Institute Scientists.

similar positions were paid, by failing to promote her, by retaliating against her because of her complaints about such discrimination, and by constructively discharging her.

The district court granted summary judgment in favor of the Institute as to each of these claims.[3] Browning now appeals. After stating the appropriate standard of review, we address her arguments, bringing additional specificity to the factual background of this case as required to address each claim.

II.

We review the district court's grant of summary judgment *de novo*, applying the same legal standard as the district court. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 308 (5th Cir. 2004). Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The burden is on the moving party to show that "there is an absence of evidence to support the nonmoving party's case." *Freeman v. Tex. Dep't. of Crim. Justice*, 369 F.3d 854, 860 (5th Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once

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[3] The district court referred all pretrial matters, including summary judgment proceedings, to a magistrate judge. The magistrate judge issued a Memorandum and Recommendation on the Institute's motion for summary judgment. The district court, after reviewing the Memorandum and Recommendation and Browning's objections to it, adopted the Memorandum and Recommendation in its entirety and granted the Institute's motion for summary judgment. Consistent with this, we reference the arguments and conclusions presented in the Memorandum and Recommendation as those of the district court.

the moving party meets its initial burden, the nonmoving party "must . . . set out specific facts showing a genuine issue for trial." FED. R. CIV. P. 56(e). The nonmoving party, however, "cannot satisfy this burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Freeman*, 369 F.3d at 860 (citation omitted). Further, a fact is material only "if its resolution could affect the outcome of the action." *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 409 (5th Cir. 2002). We review all facts in the light most favorable to the non-moving party. *Rachid*, 376 F.3d at 308.

III.

Because Browning presents no direct and express evidence of unlawful discrimination, her claim is analyzed using the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir. 2001). Under this framework, a plaintiff must first create a presumption of intentional discrimination by establishing a prima facie case. *Id.* The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). The burden on the employer at this stage "is one of production, not persuasion; it 'can involve no credibility assessment.'" *Id.* (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)). If the employer sustains its burden, the prima facie case is dissolved, and the burden shifts back to the plaintiff to establish either: (1) that the employer's proffered reason is not true but is instead a pretext for discrimination; or (2) that the employer's reason, while true, is not the only reason for its conduct, and another "motivating factor" is the plaintiff's protected characteristic. *Rachid*, 376 F.3d at 312.

A.

Browning argues that the district court erred in granting summary judgment on her Title VII and EPA claims for wage discrimination.

Both Title VII and the EPA prohibit employers from discriminating in compensation based on sex. *See* 42 U.S.C. § 2000e-2(a)(1); 29 U.S.C. § 206(d)(1). Under both Title VII and the EPA, if a plaintiff establishes a prima facie case of wage discrimination, which for the sake of argument we will assume Browning has done, then the employer can respond with evidence that the disparate wage payments were made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1); *Jones v. Flagship Intern.*, 793 F.2d 714, 723 n.8 (5th Cir. 1986) (noting that Title

VII incorporates the EPA's four defenses to a wage discrimination claim). Factors other than sex include, among other things, employees' "[d]ifferent job levels, different skill levels, previous training, and experience." *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 803 (5th Cir. 1982). If an employer responds with legitimate, non-discriminatory reasons for an alleged pay disparity, the plaintiff must then show that the purported reason is a pretext for discrimination. *See Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1137 n.8 (5th Cir. 1983) (applying Title VII pretext standard to EPA cases).

In its motion for summary judgment, the Institute referenced testimony and other evidence that demonstrated that Browning's salary reflected her prior work experience, seniority, job title, field of study,

and contributions to the work of the Institute. Having made this showing, Browning was required to raise a genuine issue of fact as to whether the purported reasons were pretextual.

As to this, the Institute argues as a threshold matter that Browning is now introducing, for the first time, arguments regarding certain male employees of the Institute and that, consequently, these arguments were not preserved for appellate review. Browning contends that these arguments and the related evidence were properly before the district court and therefore were preserved for appellate review. However, a careful review of the record shows that Browning did not provide the Institute an opportunity to address nor the district court an opportunity to rule on the arguments she now presents. We therefore hold that Browning waived any argument that she might have as to those male employees of the Institute who are now so thoroughly discussed in her briefs to this Court. *See FDIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) (noting that if a "litigant desires to preserve an argument for appeal, the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, we will not address it on appeal").[4]

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[4] In her objections to the magistrate judges's Memorandum and Recommendation, Browning reasserted her broad argument that her pay was generally and discriminatorily disparate in relation to all male Research Scientists, Senior Research Scientists, and Principal Scientists. She also, however, for the first time mentioned several individuals—both Research Scientists and Senior Research Scientists—who received a higher salary than she did. Her arguments regarding these individuals are

Thus, Browning's wage discrimination claims fail because Browning failed to raise a genuine issue of material fact as to whether the Institute's purported legitimate, non-discriminatory reasons for her allegedly disparate wage payments were a pretext for discrimination. The Institute offered testimony and other evidence that demonstrates that Browning's salary reflected her prior work experience, seniority, job title, field of study, and contributions to the work of the Institute; and Browning offers no evidence—beyond conclusory allegations—that raises a genuine issue of fact as to whether these purported reasons were pretextual. Moreover, the Institute referenced testimony and other evidence that demonstrates that any pay disparities between Browning and those in-

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vague and insufficient to raise a general issue of material fact regarding whether the Institute's offered reasons for her salary were pretextual. Indeed, her arguments were not even directed at showing that the Institute's offered reasons were pretextual. Moreover, the district court did not address Browning's arguments regarding these individuals, and Browning has presented no argument that the district court's failure to address these arguments was an abuse of discretion. *See Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 307 n.27 (5th Cir. 1999) (noting that a district court has power "to decide that legal arguments not raised before a magistrate judge are waived"). Finally, we are further confirmed in our belief that Browning presented only a vague argument regarding all male Research Scientists, Senior Research Scientists, and Principal Scientists by her reply to the Institute's response to her objections, which once again reasserted this argument and, in a footnote, objected to any requirement that she must name, with specificity, male employees whom she contends received higher pay. While it may be true that Browning was not required to name, with specificity, male employees who received higher pay to establish her prima facie case, she did need to present some evidence, by way of comparison with male employees or otherwise, that the Institute's offered reasons for her salary were pretextual—and she did not.

dividuals she had identified in her deposition testimony as occupying a comparable position at the Institute were the product of legitimate, non-discriminatory reasons; and Browning does not challenge these arguments. We there for hold that the district court appropriately dismissed Browning's Title VII and EPA wage discrimination.

B.

Browning also argues that the district court erred in granting summary judgment on her Title VII failure to promote claim.

To establish a prima facie case for a failure to promote claim, a plaintiff must establish that: (1) she is a member of the protected class; (2) she applied for a position for which she was qualified; (3) she was rejected for the position; and (4) after she was rejected, the employer continued to seek applicants with the employee's qualifications or filled the position with someone outside the protected class. *See Celestine v. Petroleos de Venezuella, S.A.*, 266 F.3d 343, 354-55 (5th Cir. 2001). A plaintiff must establish that she meets objective promotion criteria at the prima facie stage of her case. *See Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 681 (5th Cir.2001). If a plaintiff makes out a prima facie case, we analyze the claim under the familiar *McDonnell Douglas* burden-shifting framework described above. *Id.*

The Institute argues that Browning failed to establish a prima facie case on her failure to promote claim because she failed to offer evidence that she was qualified for the position she sought and failed to offer evidence that the Institute sought applicants with

similar qualifications.[5] As to each of these arguments, the Institute relies only on the fact that Browning did not receive two "Clearly Outstanding" ratings on her annual performance evaluations and that, as a matter of policy, the Institute does not promote employees who have not received two such ratings.[6] The Institute argues that the relevant performance criteria are objective and that because Browning failed to meet them she cannot establish a prima facie case.

In response, Browning argues that the Institute's performance evaluations are wholly subjective and that, consequently, the Institute's arguments do not defeat the second and fourth elements of her prima facie case.

Here, Browning has the better side of the argument. The Institute's internal documents indicate that "some of these criteria [used in staff evaluations]

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[5] The position Browning sought was eventually filled by a female. Although relevant to whether the Institute had a discriminatory intent, this fact is insufficient to defeat Browning's prima facie case. *See Nieto v. L & H Packing Co.*, 108 F.3d 621, 624 n.7 (5th Cir.1997) ("While the fact that one's replacement is of another national origin 'may help to raise an inference of discrimination, it is neither a sufficient nor a necessary condition.'" (quoting *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996)).

[6] The Institute annually evaluates each employee's performance and assigns one of five possible ratings: Clearly Outstanding, Exceeds Expectations, Meets Expectations, Needs Improvement, or Unsatisfactory. Pluses and minuses are attached to these ratings to indicate that an employee's performance is within an intermediate range. While employed at the Institute, Browning received the following ratings: 1999, Exceeds Expectations; 2000, Exceeds Expectations; 2001, Exceeds Expectations; 2002, Exceeds Expectations Minus; 2003, Meets Expectations Minus; 2004, Meets Expectations Minus.

are subjective." Moreover, deposition testimony of the individuals who performed the evaluations relevant here indicates that no objective criteria control the evaluations and that no objective measures distinguish one rating from another. As one of the evaluators testified, the evaluators simply "have a pretty good idea of the break point" between ratings. The evidence, then, indicates that the performance evaluations are subjective, as Browning argues. Further, and "[a]s we have indicated before, an employer may not 'utilize wholly subjective standards by which to judge its employees' qualifications and then plead lack of qualification when its promotion process . . . is challenged as discriminatory.'" *Medina*, 238 F.3d at 681 (alteration in original) (quoting *Crawford v. West. Elec. Co.*, 614 F.2d 1300, 1315 (5th Cir.1980)). This is true because "'the criteria . . . may be pretext for . . . discrimination.'" *Id.* Consequently, we hold that Browning has established a prima facie case for her failure to promote claim.

Because Browning has established a prima facie case, the burden shifts to the Institute to articulate a legitimate, non-discriminatory reason for its actions. Here, the Institute's subjective performance evaluations are sufficient to establish a legitimate, non-discriminatory reason for its failure to promote Browning to the position she sought. *See Alvarado v. Tex. Rangers*, 492 F.3d 605, 616 (5th Cir. 2007) ("An employer's subjective reason for not selecting a candidate, such as a subjective assessment of the candidate's performance in an interview, may serve as a legitimate, nondiscriminatory reason for the candidate's non-selection."); *Manning v. Chevron Chem. Co.*, 332 F.3d 874, 882 (5th Cir. 2003) (affirming grant of summary judgment because employee did not raise genuine issue of fact that subjective hiring

criteria were pretext for discrimination). But because subjective reasons can be a pretext for discrimination, such "reason[s] will satisfy the employer's burden of production . . . only if the employer articulates a clear and reasonably specific basis for its subjective assessment." *Alvarado*, 492 F.3d at 616. Browning's performance evaluations and the testimony of the individuals who evaluated her performance reference clear and reasonably specific bases for the Institute's subjective assessments. Browning's performance evaluations, for instance, indicate, among other things, that she made gratuitous, negative comments about her colleagues; discussed internal Institute matters with clients; failed to follow Institute procedures; made an unauthorized business trip; failed accurately to report her time; and was reluctant to participate in certain Institute initiatives.

Because the Institute has articulated a legitimate, non-discriminatory reason for not offering Browning a promotion, her prima facie case is dissolved and the burden shifts back to her to establish either: (1) that the employer's proffered reason is not true but is instead a pretext for discrimination; or (2) that the employer's reason, while true, is not the only reason for its conduct, and another "motivating factor" is the plaintiff's protected characteristic. *See Rachid*, 376 F.3d at 312.

Browning has attempted to establish that the Institute's asserted justifications are pretextual in several ways. First, Browning argues that the subjective nature of the Institute's performance evaluations allowed the Institute to suppress her rating. We have held, however, that "[t]he mere fact that an employer uses subjective criteria is not . . . sufficient evidence of pretext." *Manning*, 332 F.3d at 882. Second,

Browning testified that the alleged failure accurately to report her time was a pretextual motive manufactured by the Institute. She does not, however, offer any evidence beyond her conclusory allegation to this effect, nor does she challenge the other asserted inadequacies that are noted in her performance evaluations. Third, Browning asserts that the Institute more strictly judged her performance than that of male employees. Her citations to the record, however, demonstrate exactly the contrary. She first directs the Court to the performance evaluations of a male employee who received better evaluations than she did. These evaluations also indicate that the employee had time management issues, but these issues were hardly of the sort referenced in Browning's evaluations. Indeed, the evaluators urged the employee, for instance, "to try to achieve a better balance between devotion to his career and attention to his personal health." Browning also directs the court to the performance evaluations of a second male employee. This employee's evaluations demonstrate some interpersonal problems; the evaluators, for instance, note that "he often creates the perception that he is the single oracle-like source of . . . knowledge in the program" and "needs to develop an image of quiet, confident technical competence." Fatal to Browning's comparison, however, is that this employee did not receive more favorable evaluations.

Based on the evidence offered by Browning, no trier of fact reasonably can infer that the Institute is dissembling to cover up a discriminatory purpose.

Indeed, Browning has offered no evidence of discriminatory intent: she does not offer evidence that any Institute employee made sexist comments, that the Institute has a pattern or practice of discriminat-

ing against females, or that the individuals who evaluated her performance have ever been accused of discrimination based on sex or ever behaved in a manner that evidences such a possibility. Indeed, her only arguments that the Institute's asserted justifications are pretextual are those noted above, and there is little in the way of record evidence in support of these arguments. Thus, Browning has failed to carry her burden of establishing that the Institute's asserted justifications for not offering her the promotion she sought are pretextual. The district court did not therefore err in granting summary judgment on this claim.

C.

Browning also argues that the district court erred in granting summary judgment on her Title VII and EPA retaliation claims.

Both Title VII and the EPA—through the Fair Labor Standards Act ("FLSA")—prohibit employers from retaliating against employees who engage in activity protected under the respective acts. *See* 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 215(a)(3). To establish either a Title VII or an EPA retaliation claim, a plaintiff must establish, among other things, that she suffered an adverse employment action. *Perez v. Region 20 Educ. Ser. Ctr.*, 307 F.3d 318, 325 (5th Cir. 2002); *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 624 (5th Cir. 2008) (applying the same requirement in an FLSA case).

The Institute argues that Browning cannot establish a prima facie case of retaliation because she suffered no adverse employment action. The Supreme Court recently clarified that a retaliation claim may rest on an action that "a reasonable employee would

have found . . . [to be] materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citation and internal quotation marks omitted). This standard, as the Supreme Court noted, is phrased "in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id.* at 69. Context matters because "'[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.'" *Id.* at 69 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998)). Further, the Supreme Court noted that the materiality requirement reflects the importance of separating "significant from trivial harms." *Id.* at 68. With this standard in mind, we examine the incidents of retaliatory conduct alleged by Browning.

Browning alleges that the Institute engaged in a pattern of retaliation against her. Browning's strongest allegation is that the Institute retaliated against her by reducing her job responsibilities. It is undisputed that the Institute removed Browning from the Principal Investigator position of the Quantity and Chemistry Integrated Subissue. The loss of job responsibilities can in some circumstances constitute an adverse employment action. But as the Institute argues and as Browning admits, the Institute periodically rotates its scientists into and out of lead roles like the one Browning held. Indeed, Browning's deposition testimony references several examples of this. As noted above, we have been instructed to consider

the "particular circumstances" and the "real social impact of workplace behavior." Under these circumstances, we are certain that Browning's seemingly normal rotation out of the Principal Investigator position, with no specific association with protected activity, would not dissuade a reasonable worker from making or supporting a charge of discrimination.

Browning also alleges that the Institute retaliated against her by badgering, harassing, and humiliating her. Here, Browning first alleges that when she confronted a supervisor about her allegedly unequal pay, he responded by threatening to fire her. Her deposition testimony indicates the supervisor told her that he could fire her for cause and that Texas is a right to work state. Her notes from that meeting, however, also indicate that the supervisor made this comment in relation to a discussion of whether Browning would soon be receiving a significant pay increase. According to Browning's notes, the supervisor praised her performance but also noted that her violations of Institute policies—violations which were sufficient grounds to fire her with cause—suppressed her overall performance rating, which of course affected whether she would be promoted and whether her pay would be increased. Browning even notes that the supervisor "offered [her] a carrot" by indicating that if her attitude improved her performance evaluations would also improve. Given Browning's testimony and the evidence she presented about this conversation, we are also certain that this alleged threat would not dissuade a reasonable worker from making or supporting a charge of discrimination. Indeed, there is no indication that this conversation was anything other than an attempt to discuss Browning's concerns about her pay.

Next, Browning alleges that another supervisor reacted to her with verbal abuse and threatened her employment when she confronted him about her allegedly unequal pay. As Browning presents the argument in her brief, the supervisor told her she was "crazy," which was "a humiliating, demeaning form of badgering," and then threatened her employment. Browning's notes from this conversation, however, show the nature of the exchange between the two of them. According to Browning, the supervisor responded to her complaint by saying: "If you or anyone else thinks that something unethical is going on around here, then I suggest that you avail yourselves of the free psychiatric services provided by the Institute." And then, in discussing her performance evaluations, said: "What you have to realize is that . . . [w]e are management, you are the employee. We make the rules, and you follow them. It's as simple as that. And if you don't think that what we are doing is fair, then there is the door." Again, Browning's evidence indicates that this heated exchange of words in a work place confrontation presents no set of facts that constitute retaliation. This alleged verbal abuse, like that discussed above, amounts at best to nothing more than the "petty slights" or "minor annoyances" that all employees face from time to time. *White*, 548 U.S. at 68.

Finally, Browning alleges that the Institute retaliated against her by: attempting to hire an employee to take her position and by forcing her to interview and evaluate job applicants as a part of this process; suppressing her performance evaluations; and subjecting her to extra scrutiny. Browning, however, presents nothing but conclusory allegations to support these assertions. Browning offered no evidence that indicates that the Institute was attempting to

hire her replacement, nor any evidence that her performance evaluations were suppressed, nor any evidence that she was subjected to extra, oppressive scrutiny. Browning's "[c]onclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy" her summary judgment burden. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) (citation omitted).

Thus, we hold that Browning has not established a prima facie case for her Title VII and EPA retaliation claims because she has not created a genuine issue of fact regarding whether she suffered an adverse employment action. Further, and consequently, the district court did not err in granting summary judgment on these claims.

D.

Finally, Browning argues that the district court erred in granting summary judgment on her Title VII constructive discharge claim. As we have earlier said, Browning decided to resign from the Institute and did so in May of 2004. She argues that her resignation was compelled by the hostile conduct of the Institute toward her.

In determining whether an employer's actions constitute a basis to support a constructive discharge, we ask whether "working conditions [became] so intolerable that a reasonable person in the employee's position would have felt compelled to resign." *Penn. State Police v. Suders*, 542 U.S. 129, 141 (2004); *see McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir.2007) (stating same standard). "Mere harassment, alone, is insufficient; rather, the plaintiff must show 'aggravating factors' to justify departure." *Hockman v. Westward Commc'ns, LLC*, 407 F.3d 317, 331 (5th

Cir. 2004). In determining whether a reasonable employee would feel compelled to resign, we consider the relevancy of the following factors: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; and (7) offers of early retirement on terms that would make the employee worse off. *Id.* (citation omitted).

The record makes clear that Browning was not demoted, actually received salary increases from 2000 through 2004, was not reassigned to menial work or to a younger supervisor, and was not offered early retirement or less favorable employment terms. Browning argues, however, that she was constructively discharged. Her argument to this effect references the allegedly retaliatory treatment that we have discussed above. But for the reasons discussed above, we hold that Browning's working conditions were not so intolerable that a reasonable person in her situation would have felt compelled to resign. The district court did not therefore err in granting summary judgment on this claim.

IV.

For the reasons assigned above, the judgment of the district court is AFFIRMED.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed MAR 1, 2007]

Civil Action No. SA-05-CA-0245-FB

LAUREN BROWNING,
Plaintiff,

vs.

SOUTHWEST RESEARCH INSTITUTE,
Defendant.

JUDGMENT

The Court considered the Judgment to be entered in the above-styled and numbered cause.

Consistent with the Order Accepting Memorandum and Recommendation of the United States Magistrate Judge filed in this cause on this same date,

It is hereby ORDERED, ADJUDGED and DECREED that the Memorandum and Recommendation of the United States Magistrate Judge, filed in this case on October 6, 2006 (docket #97), is ACCEPTED such that Defendant Southwest Research Institute's Motion for Summary Judgment (docket #72) is GRANTED and plaintiff's case is DISMISSED WITH PREJUDICE. Motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 1st day of March, 2007.

/s/ Fred Biery
FRED BIERY
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed MAR 1, 2007]

Civil Action No. SA-05-CA-0245-FB

LAUREN BROWNING,
Plaintiff,

vs.

SOUTHWEST RESEARCH INSTITUTE,
Defendant.

ORDER ACCEPTING MEMORANDUM AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND GRANTING OF MOTION FOR LEAVE TO FILE SUR-RESPONSE

Before the Court is Defendant's Motion for Leave to File Sur-Response to Plaintiff's Reply to Defendant's Response to Plaintiffs Objections to Magistrate's Memorandum and Recommendation filed December 1, 2006. Defendant seeks leave to file its sur-response in order to fully and adequately develop and present to the Court the issues presented in the underlying pleadings. The Court finds the motion has merit and should be granted.

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Leave to File Sur-Response to Plaintiff's Reply to Defendant's Response to Plaintiff's Objections to Magistrate's Memorandum and

Recommendation (docket #110) is GRANTED such that the Court will consider the Defendant's Sur-Response to Plaintiffs Reply to Defendant's Response to Plaintiff's Objections to Magistrate's Memorandum and Recommendation attached to the motion for leave filed on December 1, 2006. However, in order for the Sur-Response to become an official part of the record, defendant shall have until **March 9, 2007, 2006,** to electronically file Defendant's Sur-Response to Plaintiffs Reply to Defendant's Response to Plaintiff's Objections to Magistrate's Memorandum and Recommendation which was attached to the motion for leave. See 4(c), *Administrative Policies and Procedures for Electronic Filing in Civil and Criminal Cases,* Western District of Texas, revised October 6, 2006 ("If the filing of a document requires leave of Court, the Filing User must include for the Court's review the document as a PDF attachment to the motion requesting leave to file. If the Court grants the motion, the Filing User must then file the document electronically.").

The Court has considered the Memorandum and Recommendation of the United States Magistrate Judge filed in the above styled and numbered cause on October 6, 2006, Plaintiff's Objections to the Memorandum and Recommendation of the United States Magistrate Judge filed October 23, 2006 (docket #102); Defendant's Response to Plaintiffs Objections to Magistrate's Memorandum and Recommendation filed November 9, 2006 (docket #106); Plaintiffs Reply to Defendant's Response to Plaintiffs Objections to Magistrate's Memorandum and Recommendation filed November 20, 2006 (docket #109); and Defendant's Sur-Response to Plaintiff's Reply to Defendant's Response to Plaintiff's Objections to

Magistrate's Memorandum and Recommendation received on December 1, 2006.

Where no party has objected to a Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of them. *See* 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made. "). In such cases, the Court need only review the Memorandum and Recommendation and determine whether they are either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918 (1989).

On the other hand, any Memorandum or Recommendation to which there are objections requires de novo review by the Court. Such a review means that the Court will examine the entire record, and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has reviewed the objections to the Memorandum and Recommendation and has conducted a de novo review of the Magistrate Judge's Memorandum and Recommendation with respect to those matters properly raised by the objections. *See Memorandum and Recommendation* at page 29 ("A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objection; the district court need not consider frivolous, conclusive or general objections."). The Court finds the objections to the Magistrate Judge's Rec-

ommendation are without merit. This Court hereby accepts, approves, and adopts the Magistrate Judge's factual findings and legal conclusions contained in the Memorandum and Recommendation and incorporates herein the arguments and authorities presented by the defendant in its response (docket #106) and its sur-response.

Therefore, the Memorandum and Recommendation shall be accepted pursuant to 28 U.S.C. § 636(b)(1) such that Defendant Southwest Research Institute's Motion for Summary Judgment (docket #72) should be GRANTED.

Accordingly, it is hereby ORDERED that the Recommendation of the United States Magistrate Judge, filed in this case on October 6, 2006 (docket #97), is ACCEPTED such that Defendant Southwest Research Institute's Motion for Summary Judgment (docket #72) is GRANTED and the case is DISMISSED WITH PREJUDICE. Motions pending, if any, are also DISMISSED.

It is so ORDERED.

SIGNED this 1st day of March, 2007.

/s/ Fred Biery
FRED BIERY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

[Filed Oct. 6, 2006]

Civil No. SA-05-CA-0245-FB

LAUREN BROWNING,
Plaintiff,

v.

SOUTHWEST RESEARCH INSTITUTE,
Defendant.

MEMORANDUM AND RECOMMENDATION

Before the Court is defendant's motion for summary judgment. (Docket nos. 72, 96). Plaintiff has responded. (Docket no. 77). Upon consideration of the briefs, the arguments given, the presented evidence, and the applicable law, the Court concludes defendant's motion should be GRANTED.

Factual Background

Lauren Browning instituted this lawsuit against her former employer Southwest Research Institute ("SwRI") alleging causes of action for gender and retaliation discrimination under Title VII of the Civil Rights Act of 1964, violation of the Equal Pay Act, 29 U.S.C. Sections 206(d) and 215(a)(3) and retaliation for her complaints of disparate pay.

In her original complaint, Dr. Browning alleges she was employed as a one-year contract employee by SwRI, Division 20, beginning on December 7, 1998.

After serving her initial year, Dr. Browning was retained as a permanent Research Scientist for Division 20 beginning October 14, 2000. She resigned from her position on May 21, 2004, and later filed this lawsuit. In her complaint, Dr. Browning alleges that during her tenure at SwRI, she was paid considerably less than male employees with comparable education and experience. She contends SwRI continually refused to promote her even though her qualifications were similar or superior to male colleagues promoted above her level after working as Research Scientists for a shorter time. She states SwRI retaliated against her for her complaints of the disparities in pay and advancement opportunities by stripping her of primary job responsibilities when she complained. SwRI now moves for summary judgment on all of Dr. Browning's asserted causes of action.

Standard of Review

Federal Rule of Civil Procedure 56(b) provides that a defending party may move, with or without supporting evidence, for a summary judgment in the party's favor. Summary judgment shall be rendered if the pleadings and evidence show there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)) . A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The party opposing a motion must present affirmative evidence to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). A defendant who moves for summary judg-

ment on the plaintiff's claim may satisfy its burden in two ways: (1) submit evidence that negates the existence of a material element of the plaintiff's claim; or (2) show there is not evidence to support an essential element of the plaintiff's claim. *Celotex Corp.*, 477 U.S. at 325. An adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or otherwise, must set forth specific facts showing there is a genuine issue for trial; if he does not so respond, summary judgment, if appropriate, shall be entered against him. FED. R. CIV. P. 56(e) .

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson*, 477 U.S. at 247-248. The dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* All of the evidence and inferences drawn from that evidence must be viewed in the light most favorable to the party opposing the motion for summary judgment. *Hibernia Nat'l Bank v. Carner*, 997 F.2d 94, 97 (5th Cir. 1993).

DISCUSSION

I. TITLE VII DISCRIMINATION

There are two methods for proving employment discrimination claims. First, a claim may be established by presenting direct evidence of discrimination. Second, if the plaintiff must rely on circumstantial evidence, the indirect method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) is appropriate. *See Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 989 (5th Cir. 2002). In this

case, Dr. Browning relies upon circumstantial evidence to establish her claims.

The indirect method of proof in an employment discrimination case requires that a plaintiff carry the initial burden of proving, by the preponderance of the evidence, a prima facie case of discrimination. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). If the plaintiff satisfies this burden, a rebuttable presumption arises that the employer unlawfully discriminated. *Patterson*, 491 U.S. at 187; *Burdine*, 450 U.S. at 254. The burden of production then shifts to the defendant to present evidence the challenged action occurred for a legitimate, nondiscriminatory reason. *Burdine*, 450 U.S. at 254-55. If this burden is met, the presumption disappears and the plaintiff must then—prove either: (1) the reason articulated by the employer was a mere pretext for discrimination (pretext alternative), or (2) the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic (mixed-motive alternative). *Patterson*, 491 U.S. at 187; *Burdine*, 450 U.S. at 256. Therefore, under this integrated approach, a plaintiff relying on circumstantial evidence has two options for surviving summary judgment: (1) the plaintiff may offer evidence showing the defendant's proffered nondiscriminatory reasons are false; or (2) the plaintiff may offer evidence showing discriminatory animus was a motivating factor for the defendant's adverse employment decision. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004); *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005). For purposes of proving the pretext alternative, it is not enough to show the stated reason was false; plaintiff must show both the

stated reason was false, and discrimination was the actual reason for the adverse employment action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 516-17 (1993). It is, however, permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude the employer unlawfully discriminated. *Id.* at 148. Therefore, the plaintiff need not produce independent evidence of discrimination, instead, "rejection of the defendant's proffered reasons will permit a trier of fact to infer the ultimate fact of intentional discrimination." *St. Mary's Honor Ctr.*, 509 U.S. at 511.

Under the mixed-motive alternative, in which the plaintiff alleges the employment decision was based on a "mixture of legitimate and illegitimate motives," the plaintiff need only prove an illegitimate motive was a motivating factor in the decision. *Rachid*, 376 F.3d at 312. Should the plaintiff meet this burden, the employer may avoid liability by proving it would have made the same employment decision regardless of discriminatory animus. *Id.* Thus, the employer's burden at this stage is effectively that of proving an affirmative defense. *Machinchick*, 398 F.3d at 352. If the employer fails to carry this burden, plaintiff prevails. *Id.* The plaintiff retains the burden of persuading the fact-finder of intentional discrimination throughout the analysis. *Burdine*, 450 U.S. at 253.

Therefore, at the first stage of the *McDonnell-Douglas* analysis, Dr. Browning must show she meets the prima facie elements of gender discrimination,

which include: (1) she belongs to a protected group, i.e., female, (2) she was qualified for her position, (3) she suffered an adverse employment action, and (4) a similarly situated person, not a member of her protected group was treated favorably. *Okoye v. Univ. of Tex. Houston Health Science Ctr.*, 245 F.3d 507, 512-13 (5th Cir. 2001). In this motion for summary judgment, SwRI disputes only Dr. Browning's ability to establish the third prong of her prima facie burden of proof, i.e. that she suffered an adverse employment action. In relation to the third prong of a prima facie case, the Fifth Circuit has long held Title VII was designed to address only ultimate employment decisions, not every decision made by employers that arguably might have some tangential effect upon ultimate decisions. *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997)(quoting *Dollis v. Rubin*, 77 F.3d 777, 781-782 (5th Cir. 1995)). Ultimate employment decisions include acts "'such as hiring, granting leave, discharging, promoting and compensating.'" *Mattern*, 104 F.3d at 707 (quoting *Dollis*, 77 F.3d at 781-782)(citation omitted)).

Dr. Browning contends her resignation amounted to an adverse employment action because it constituted a constructive discharge. At this first stage of the *McDonnell-Douglas* burden shifting analysis, to survive summary judgment based upon an assertion that she suffered a constructive discharge, a plaintiff must produce evidence her working conditions were "'so intolerable that a reasonable employee in her position would [have felt] compelled to resign.'" *Denman v. Tx. Dep't of Licensing and Regulation*, No. SA04-CA-620-RF (Jan. 19, 2006), 2006 WL 504059 at *3 (*quoting Hockman v. Westwood Commc'ns, L.L.C.*, 407 F.3d 317, 331 (5th Cir. 2004)). To make this showing, a plaintiff must establish the existence of

"aggravating factors," not merely harassment. *Denman*, at *3 In making this determination of constructive discharge, courts consider the following aggravating factors: "(1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status." *Brown v. Kinney Shoe Corp.*, 237 F.3d 556, 566 (5th Cir. 2001). To prevail on a constructive discharge claim, a plaintiff must ultimately show a greater degree of harassment than that required for a hostile work environment claim. *Hockman v. Westwood Commc'ns, L.L.C.*, 407 F.3d at 331. "Discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge, as is a discriminatory failure to promote." *Brown v. Kinney Shoe Corp.*, 237 F.3d at 566. To survive summary judgment, a plaintiff must show the harassment was so severe and pervasive that she was essentially prevented from succeeding in the workplace. *Hockman*, 407 F.3d at 325.

Dr. Browning contends her constructive discharge was based solely on aggravating factors three and six: a reduction in her job responsibilities and badgering and harassment calculated to encourage her resignation. Dr. Browning contends that after she complained to her supervisors of disparate salary, they engaged in a calculated plan to harass and humiliate her to force her resignation. Dr. Browning cites several instances which she asserts support these contentions. First, Dr. Browning states she wrote on her 2002 performance review that management's re-

sponse to her complaints of pay disparity "warrants scrutiny". As a result, she attests "the Center's President, Wes Patrick," came to her office to confront her about her comment. She attests he was very upset and threatened and intimidated her by saying "he could fire me right then and there, for cause and reminding me that Texas was a right to work state." *See plaintiff's response*, exh. 48, p.2.

Next, Dr. Browning contends she was subjected to a higher level of scrutiny than her male co-workers in making travel arrangements and in getting approval for travel expenses that exceeded per diem protocol. Dr. Browning contends her 2003 performance evaluation reflected these unfounded criticisms of failure to use proper travel-arrangement protocol. Dr. Browning, next, asserts that in July 2003, although there were no openings, SwRI began a search for a Senior Research Scientist, a promotional position she repeatedly told her supervisors she desired. The job description listed the same work she was already performing at her lower position. However, Dr. Browning contends she was not approached by her supervisory team to apply for the position. Dr. Browning also asserts she was forced to participate in the interview process for her replacement shortly before her resignation. Dr. Browning also asserts that in 2004, she was not considered for a position as a Principal Scientist in Planetary Sciences, even though she had sufficient experience.

Dr. Browning contends her supervisors artificially suppressed her yearly performance evaluations to prevent her from qualifying for a promotion to a higher grade by downgrading her performance based upon subjective and minor alleged offenses. Finally, Dr. Browning asserts her supervisor, English Pearcy,

kept a secret file containing documentation of his perceptions of instances in which her performance was inadequate. Dr. Browning contends that after her supervisory team decided to force her resignation, Pearcy met with her often to discuss these perceived shortcomings and inadequacies in her performance. With regard to the third aggravating factor, Dr. Browning asserts her job responsibilities were reduced when her supervisor, English Pearcy, removed her from the lead position in an ongoing research project without following the usual protocol.

To support these named incidents, Dr. Browning submits as evidence her attested handwritten notes taken after each event. *Plaintiff's response to summary judgment motion*, exhs. 48-50, 52, 57, 59. These notes document her perception of the particular event and any conversation and actions that took place. Dr. Browning also submits her performance evaluations for the pertinent years and the disciplinary notes from her personnel file regarding her alleged violation of travel-arrangement protocol. *Plaintiff's response* at exhs. 7, 39-41.

While this summary judgment evidence raises a genuine issue of material fact whether the named incidents actually occurred, it does not serve to set forth sufficient evidence of harassment or humiliation necessary to raise a genuine issue of material fact whether Dr. Browning was constructively discharged. Although Dr. Browning *perceived* her supervisory team engaged in a calculated plan to force her resignation, these collective facts do not support such a finding, nor do they raise a genuine issue of material fact of a calculated plan. Also, these named incidents and evidence do not raise a genuine issue of material fact whether Dr. Browning was treated dif-

ferently than her male co-workers. And, in any event, discrimination, alone, without a showing of any of the aggravating factors cannot serve as basis for a claim of constructive discharge. Therefore, the named incidents based in disparate treatment must be disregarded for this purpose.

When viewed collectively, the named incidents do not establish a genuine issue of material fact whether Dr. Browning can establish her working conditions were so intolerable a reasonable employee under these circumstances would feel compelled to resign following their occurrences. Plaintiff complains of her removal as Q&C ISI lead. However, summary judgment evidence reflects that this occurred because she was unable, due to distractions of other duties, to give the project focused attention. *Plaintiff's response* at exh. 64, pp. 103-104. While the alleged incident with Wes Patrick was believably intimidating and humiliating, even this incident in conjunction with the alleged discrimination does not raise a genuine issue of material fact whether a reasonable person would have felt compelled to resign. Although, in hindsight, Dr. Browning might be humiliated to learn her supervisor retained "a secret file" on her performance shortcomings, admittedly, it was "secret", and therefore, at the time of her resignation was not known to her. Consequently, this fact cannot serve to raise a genuine issue of material fact whether her working conditions were so intolerable that she felt compelled to resign. In addition, while Dr. Browning may present evidence she was not asked to apply for, or was not considered for, several promotion positions, she fails to show she was prevented in any way from applying. Therefore, the allegations that she was not asked or encouraged to apply for promotional positions cannot raise a genuine issue of material fact

whether her working conditions were so intolerable she felt compelled to resign. The fact that Dr. Browning participated in interviewing her replacement could not serve as basis for showing constructive discharge because at the time, she did not know she would resign or that this interviewee would replace her.

To the extent Dr. Browning contends her supervisor intentionally repressed her performance evaluations to prevent her from gaining promotions, her claim also fails. The evidence shows, and Dr. Browning admitted, Dr. Browning was required to attain consecutive ratings of "clearly outstanding" on her performance evaluations to be eligible for a promotion. *Defendant's motion*, exh. A, par. 10. While Dr. Browning alleges her performance evaluations were subjectively suppressed, she presents no evidence to show they were not accurate or that she would have been otherwise eligible for a better rating without Pearcy's alleged subjective criticisms. Dr. Browning presents no evidence which would raise a genuine issue of material fact whether she should have received this rating for two consecutive years, and therefore, her constructive discharge claim based upon suppression of her performance evaluations must fail. In any event, assuming Dr. Browning is correct that she should have received the required ratings, this allegation of intentional suppression is insufficient to raise a genuine issue of material fact of the existence of harassment to support her claim of constructive discharge, even in light of the other alleged instances of harassment.

For these reasons, Dr. Browning fails to raise a genuine issue of material fact whether she can show she was constructively discharged. Based upon this

finding, Dr. Browning cannot raise a genuine issue of material fact whether she suffered an adverse employment action, an element of her prima facie case. Because Dr. Browning is unable to raise a genuine issue of material fact whether she can satisfy her initial burden of proof under *McDonnell Douglas*, the Court need not explore the remainder of the parties' shifting burdens. Accordingly, SwRI's motion for summary judgment on Dr. Browning's Title VII cause of action for gender discrimination should be GRANTED.

II. RETALIATION UNDER TITLE VII

SwRI moves for summary judgment on Dr. Browning's Title VII retaliation cause of action on two bases. First, SwRI contends Dr. Browning failed to exhaust her administrative remedies on her claim that SwRI retaliated against her based upon her complaints of gender discrimination. Thus, SwRI contends Dr. Browning is barred from raising this claim. Next, SwRI contends Dr. Browning cannot show she engaged in protected activity, an element of her prima facie case to show retaliation, and thus, her claim must fail as a matter of law. The Court will address each bases for summary judgment in turn.

A. Exhaustion of Administrative Remedies

SwRI' s first argument in support of its motion for summary judgment on Dr. Browning's retaliation cause of action under Title VII is that she failed to allege the occurrence of such retaliation in the charge she filed with the EEOC, even though she alleges the retaliation occurred prior to the charge. Because she failed to make this allegation in her EEOC charge, SwRI contends Dr. Browning failed to exhaust her administrative remedies on this claim, and thus, is

precluded from asserting this retaliation cause of action as a matter of law.

It is well-settled that courts may not adjudicate Title VII claims to which the aggrieved party has not exhausted administrative remedies. *National Ass'n of Govern. Emp. v. City Pub. Serv.*, 40 F.3d 698, 711 (5th Cir. 1994)(*citing Tolbert v. United States*, 916 F.2d 245, 247-48 (5th Cir. 1990)(per curiam)). Exhaustion occurs when the plaintiff: (1) files a timely charge with the EEOC and (2) proceeds through the administrative process and receives a statutory notice of right to sue. 42 U.S.C. § 2000e-5 (e) (1) ; *see also Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378-379 (5th Cir. 2002); *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788-89 (5th Cir. 1996). The purpose of this requirement is to allow the agency, in its investigatory and conciliatory role, the opportunity to fully investigate and attempt to resolve claims of discrimination. The charge of discrimination also serves as notice to the employer of the employee's allegations. *Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1319 (11th Cir.2001).

Because filing an EEOC charge is a mandatory prerequisite of a Title VII lawsuit, the trial court's scope of inquiry is limited to "those grounds of a Title VII complaint that were raised in the administrative process." *Anderson v. Lewis Rail Serv. Co.*, 868 F.2d 774, 775 (5th Cir. 1989). Consequently, court action cannot encompass facts or issues that do not relate to the subject matter of the EEOC charge. *Id.* Because the fundamental purpose of the charge is to trigger an investigation by the EEOC, the reasonable limits of an investigation potentially triggered by an EEOC charge define the substantive limits of a subsequent Title VII action. *Terrell v. United States Pipe &*

Foundry Co., 644 F.2d 1112, 1123 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982).

In construing the claims presented, a charge must be liberally construed because it is generally the work of a layman. *Tillman v. City of Boaz*, 548 F.2d 592, 594 (5th Cir. 1977). The Fifth Circuit has made it clear that mere procedural technicalities should not bear upon a plaintiff's claim. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 460 (5th Cir. 1970). Therefore, the rule of interpretation of an EEOC charge forming the basis of a judicial complaint is that the limits of a Title VII action are limited to any kind of discrimination related to the charge's allegations. That is, the judicial complaint is limited only by the scope of the EEOC's investigation that could reasonably be expected to grow out of the initial charge of discrimination. *Id*; *Fine v. GAF Chemical Corp.*, 995 F.2d 576, 578 (5th Cir. 1993)(quotation and citation omitted). Thus, the crucial element of a charge of discrimination is the factual statement contained therein. *Sanchez*, 431 F.2d at 462.

In her charge filed with the EEOC, Dr. Browning indicated, by checking the appropriate boxes, that she wished to make a charge of discrimination based upon her sex and a charge of violation of the Equal Pay Act. *Plaintiff's response*, exh. 2. Dr. Browning did not mark the box associated with a charge of "retaliation". *Plaintiff's response*, exh. 2. In her written statement, Dr. Browning stated the basis of her discrimination and disparate pay claims and also stated

> [a]fter I complained several times of these issues, I was subjected to a hostile work environment in that my work was undermined, as well as credibility with my peers, and in January 2004, I was stripped of my main job responsibilities alleging

that I was too aggressive, and talked too much in meetings.

Id.

This Court finds this specific written statement included within Dr. Browning's EEOC charge is sufficient to satisfy the requirement of exhaustion of remedies. Although Dr. Browning failed to check the appropriate box marked "retaliation", she described the general nature of this cause of action in the narrative section of the charge. This statement implicates the behavior of SwRI that she now asserts to be the basis of her retaliation claim and gave sufficient indication to the EEOC and SwRI that she was also seeking redress for unlawful retaliation. Thus, based upon this statement, Dr. Browning's retaliation claim could have reasonably grown out of the EEOC investigation into gender discrimination and her claim of constructive discharge. Accordingly, SwRI's motion for summary judgment on Dr. Browning's Title VII retaliation cause of action based upon failure to exhaust administrative remedies does not have merit.

B. Protected Activity

SwRI's second argument in support of its motion for summary judgment on Dr. Browning's retaliation cause of action under Title VII is that she failed to engage in protected activity giving rise to protection from retaliation. Therefore, SwRI contends Dr. Browning is precluded from asserting this retaliation cause of action as a matter of law.

A plaintiff can establish retaliation with circumstantial evidence under the McDonnell-Douglas framework. *DiCarlo v. Potter*, 358 F.3d 408, 420 (6th Cir.2004). Under this burden-shifting analysis, the plaintiff carries the initial burden of proving, by a

preponderance of the evidence, a prima facie case of discrimination. *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981). A prima facie case of retaliation requires proof (1) the plaintiff engaged in an activity protected by Title VII; (2) the defendant knew that the plaintiff exercised his or her rights; (3) the defendant took an employment action against the plaintiff that a reasonable employee would have found materially adverse; and (4) there was a causal connection between the protected activity and the adverse employment action. *Burlington N. & Santa Fe Rwy. Co. v. White*, __ U.S. __, 126 S.Ct. 2405, 2415 (2006); *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 325 (5th Cir. 2002); *Walker v. Thompson*, 214 F.3d 615, 628-29 (5th Cir. 2000). With regard to the first prong of this prima facie case, an employee engages in protected activity if she opposes any practice made unlawful by Title VII. 42 U.S.C. § 2000e-(3)(a). A formal complaint is not necessary to satisfy the opposition requirement. An employee's informal complaint to a supervisor regarding conduct the employee perceives to be discriminatory is sufficient to satisfy the opposition requirement of Prong One. *See e.g., Green v. Adm'rs of Tulane Educ. Fund*, 284 F.3d 642, 657 (5th Cir. 2002); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 427-429 (5th Cir. 2000) ; *Carter-Obayuwana v. Howard Univ.*, 764 A.2d 779, 790-791 (D.C. App. 2001); *Mansfield v. Billington*, 432 F. Supp. 2d 64, 73 (D.D.C. 2006). The issue whether an employee engages in protected activity is a question of law. *Carter-Obayuwana*, 764 A.2d at 790.

In her response to the motion for summary judgment and original complaint, Dr. Browning alleges she engaged in protected activity by complaining to

her supervisors of disparate salary compared to her male peers. Dr. Browning contends she complained in January 2001, 2002, and 2003 by making a notation on her yearly Performance Evaluations that her pay was not equal to those of her male peers. As evidence to support these allegations, Dr. Browning submits these Performance Evaluations. *See Plaintiff's response*, exhs. 39-41. This evidence shows Dr. Browning wrote in her Performance Evaluation dated January 29, 2002, "I feel, however, I am under- compensated for the nature and extent of the benefits that I bring to the table on behalf of our NRC client, relative to my peers. I ask that you please consider this anew, and find a protocol to make the appropriate salary and status adjustments." *Plaintiff's response*, exh. 39, SwRI p. 711. In the same evaluation, Dr. Browning later reiterated this statement verbatim. *Id.* at p. 722. In her deposition, Dr. Browning attests she included with this written statement a survey conducted by the American Chemistry Society that indicated her salary fell below the bottom tenth percentile of typical chemists' salaries. *Id.* at exh. 62, p. 243: 13-20; exh. 49. She also attests she noted that female chemists generally earned less than their male counterparts and asked Mr. Pearcy if that was what was happening to her at SwRI. *Id.*

In her Performance Evaluation dated January 21, 2003, after discussing the past year's accomplishments, Dr. Browning wrote, "[t]aking all this into account, please support my promotion to the appropriate level technical position for an extremely accomplished Ph.D. in her eighth year of post-graduate work." *Id.* at exh. 40. Although Dr. Browning contends she wrote notation on the back of this evaluation form, she did not submit evidence of this notation. *see id.* In her Performance Evaluation dated

January 29, 2004, after discussing the past year's accomplishments, Dr. Browning wrote, "I urge you to please support my immediate promotion and salary adjustment level as described by the SwRI career ladder." *Plaintiff's response*, exh. 41.

This Court finds Dr. Browning's evidence insufficient to raise a genuine issue of material fact whether she engaged in a protected activity to support a retaliation claim. While informal complaints to a supervisor of any perceived unlawful discrimination might be sufficient to show an employee engaged in a protected activity, Dr. Browning's notations on her yearly performance evaluations do not amount to such informal complaints. The notations included in Dr. Browning's Performance Evaluations dated 2003 and 2004 do not indicate any complaint relative to pay disparate to her male peers or any other gender-based discrimination. The notations for these two years indicate only a generic, neutral request for appropriate promotion and salary increase in relation to her education, experience, or contributions to her Division in the particular year. *See plaintiff's response*, exh. 39. Therefore, Dr. Browning's neutral notations on these two Performance Evaluations cannot serve as a basis to imply Dr. Browning engaged in an activity protected by Title VII.

Only the notation included on her Performance Evaluation dated January 2003 could be construed as a complaint that she was not paid commensurate with her peers. *See plaintiff's response*, exh. 39. However, even this complaint does not indicate she attributed this disparity to gender discrimination. Dr. Browning indicates only that she is under- compensated relative to her peers and requests consideration for appropriate salary and status adjustments. Even

accepting as true Dr. Browning's complaint that she was under- compensated, this conduct is not a practice made unlawful by Title VII, and therefore, Dr. Browning's complaint is not an activity protected by Title VII.

Dr. Browning contends that it must be implied from her comments in all years referenced that she made a gender-based complaint because all of her colleagues and peers at the time of the complaints were male. However, this Court finds this implication cannot be made based upon the language used in the complaints. Dr. Browning requests only appropriate promotion and salary adjustment. While it was clear that Dr. Browning worked in a male dominated field at the time of her complaints, her written notations were insufficient to alert SwRI that she intended to complain about gender-based discriminatory conduct. The fact that her peers were all male is not enough to derive such an implication.

For these reasons given, this Court finds Dr. Browning has failed to present sufficient summary judgment evidence to raise a genuine issue of material fact whether she engaged in activity protected by Title VII. Accordingly, SwRI's motion for summary judgment on Dr. Browning's Title VII retaliation cause of action should be GRANTED and this cause of action dismissed.

III. EQUAL PAY ACT

The Equal Pay Act (EPA) amended the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, to require that all persons performing equal work receive equal pay, unless a difference in pay is justified by reasons other than gender. 29 U.S.C. § 206(d). Although EPA claims are analyzed using a shifting-burdens frame-

work, the analysis is different. After the plaintiff establishes a prima facie case of discrimination in pay, the burdens of production and persuasion shift to the defendant to show that the difference in pay falls within one of the four affirmative defenses provided in the EPA. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196, (1974). In contrast to claims under Title VII, the burden of persuasion shifts to the defendant after the plaintiff establishes a prima facie case. *See Burdine*, 450 U.S. at 253.

To establish a prima facie case of discrimination under the EPA, the plaintiff must show (1) the employer is subject to the EPA; (2) plaintiff performed work in a position requiring equal skill, effort, and responsibility under similar working conditions; and (3) plaintiff was paid less than employees of the opposite sex. *Chance v. Rice Univ.*, 984 F.2d 151, 153 (5th Cir. 1993). A showing of "equal work" requires only that the plaintiff prove that the skill, effort and responsibility required in the performance of the jobs compared are substantially equal. *Peters v. City of Shreveport*, 818 F.2d 1148, 1153 (5th Cir. 1987). This showing requires plaintiff to show the job requirements and performance were substantially equal, though not necessarily identical, to those of a male employee. Also, a showing of "equal work" requires a factor-by-factor comparison of the jobs at issue, and the plaintiff must identify at least one male comparator for purposes of the inquiry. *Strag v. Bd. Of Trs. Of Craven Cmty. Coll.*, 55 F.3d 943, 948 (4th Cir. 1995).

After the plaintiff establishes a prima facie case, the employer may avoid liability by showing the unequal pay was made pursuant to (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a

differential based on any other factor other than sex. *See* 29 U.S.C. § 206(d)(1); *Brennan*, 417 U.S. at 196. Because the exceptions to the Equal Pay Act are to be narrowly construed, summary judgment is proper only if the defense is so clearly established that no rational jury could find to the contrary. *Buntin v. Breathitt Cty. Bd. of Educ.*, 134 F.3d 796, 800 (6th Cir. 1998) (*citing EEOC v. State of Del. Dep't of Health and Soc. Servs.*, 865 F. 2d 1408, 1414 (3d Cir. 1989)). Once the employer establishes a defense, the employee may show the purported reason is pretext for discrimination. *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1136 (5th Cir. 1983).

SwRI contends Dr. Browning cannot meet her prima facie burden of proof because she cannot satisfy the second prong, that is, she cannot show the skill, effort and responsibility required in the performance of her job compared to those of her named comparators, Drs. Pickett, Turner, Pabalan, and Murphy, are substantially equal. Assuming Dr. Browning could satisfy her prima facie burden of proof, SwRI contends all the named comparators possessed greater experience and more appropriate and applied education to the field of work. Dr. Browning responds to SwRI's argument by stating only that SwRI

> limits its attack to four individuals named by Browning, a lay person, early in discovery of this matter-before SwRI produced any documents and before Browning could review those same documents to determine with certainty who among her peers were receiving salaries higher than her own.

Plaintiff's response, p. 51. Without presenting any summary judgment evidence to establish her prima

facie burden of proof, Dr. Browning contends only that SwRI "has not meet [sic] its summary judgment burden as to Browning's claim that she was paid less than male Research Scientists, Senior Research Scientists, and Principal Scientist Scott Painter " *Id.*

Dr. Browning fails to recognize the proper analysis for establishing a violation of the EPA. The first of the shifting burdens falls upon Dr. Browning to establish a prima facie case. The second prong of this initial burden requires that Dr. Browning name, with specificity, male comparators who she contends received higher pay, yet performed substantially equal work. Next, Dr. Browning must show the job requirements and performance of the two jobs were substantially equal; however she received a lower salary than the male counterpart in the comparative job. In her response, Dr. Browning contests only the comparators used by SwRI in its argument. However, these are comparators named by Dr. Browning, and she presents no others to be used. It is Dr. Browning's burden to name proper comparators, not SwRI's.

The summary judgment evidence presented by SwRI shows the named comparators did not hold jobs at the same level as Dr. Browning, but were higher up the career ladder. *See defendant's motion,* exh. D, pp. 93-94, 167-169, 174, 186, 189, 191; exhs. M, N, O. Therefore, the summary judgment evidence before the Court shows the comparators did not hold similar positions, nor are the job and performance requirements substantially equal.

Assuming Dr. Browning attempts to argue that her promotion to a comparable level was suppressed based upon discrimination of her gender, any applicable cause of action is not cognizable under the EPA. Assuming Dr. Browning attempts to name another

comparator, Scott Painter, in her response to the motion for summary judgment, she still fails to satisfy her prima facie burden of proof with regard to this new comparator. Dr. Browning presents no summary judgment evidence, nor presents any directive argument from which this Court my find a genuine issue of material fact whether Dr. Painter's job requirements and performance were substantially equal to Dr. Browning's. The summary judgment evidence presented indicates the contrary. *See defendant's motion*, exh. A, p. 77; exhs. M, N, O.

Even assuming Dr. Browning satisfied her prima facie burden of proof, SwRI presents sufficient summary judgment evidence of a defense allowed under the EPA. SwRI shows any disparate wage payments to Dr. Browning and the named comparators is based upon their greater experience level and longer seniority. In her deposition, Dr. Browning admitted that each of the named comparators had more years of experience since their Ph.D. than she did at the relevant time. *Defendant's motion*, exh. D, p. 168- 169, 186-189. The evidence further shows Drs. Murphy and Pabalan were hired ten years earlier than Dr. Browning; Dr. Turner was hired eight years earlier, and; Dr. Pickett was hired four years earlier. *Id.* at exhs. X, Y, Z, AA. This evidence establishes SwRI held a legitimate reason for any disparate salary between Dr. Browning and her comparators, and therefore, it satisfies its burden. The burden then shifts to Dr. Browning to raise a genuine issue of material fact whether these reasons given are pretext for discrimination. However, she presents no argument in this regard, and directs this Court to no summary judgment evidence which would raise a genuine issue of material fact of pretext. For these reasons, this Court finds Dr. Browning has failed to satisfy her burden of

proof to avoid summary judgment on this cause of action for violation of the EPA. Accordingly, SwRI's motion for summary judgment on Dr. Browning's cause of action for violation of the EPA should be GRANTED, and this cause of action dismissed.

IV. RETALIATION UNDER THE EQUAL PROTECTION ACT

Dr. Browning also contends SwRI violated the EPA by retaliating against her based upon her complaints of disparate pay. The EPA, through the Fair Labor Standards Act ("FLSA"), prohibits retaliation against an employee who files a complaint, initiates proceedings, or assists in the initiation of proceedings. 29 U.S.C. § 215(a) (3). To prove his retaliation claim, Plaintiff must prove the same elements that are required under Title VII's three-step *McDonnell Douglas* test. *See James v. MedicalControl, Inc.*, 29 F.Supp.2d 749, 752 (N.D.Tx. 1998); *Hashop v. Rockwell*

Space Operations Company, 867 F.Supp. 1287, 1299 (S.D.Tx. 1994). For the same reasons Dr. Browning's Title VII retaliation cause of action fails, her EPA retaliation also fails.

RECOMMENDATION

It is the recommendation of the Magistrate Judge that defendant's motion for summary judgment be GRANTED.

Instructions for Service and Notice of Right to Appeal/Object

The United States District Clerk shall serve a copy of this United States Magistrate Judge's Memorandum and Recommendation on all parties by either (1) electronic transmittal to all parties represented by

attorneys registered as a "Filing User" with the Clerk of Court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Pursuant to Title 28 U.S.C. Section 636 (b) (1) and Rule 72(b), FED.R.CIV.P., any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the district court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. *Such party shall file the objections with the clerk of the court, and serve the objections on all other parties and the magistrate judge.* A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a de novo determination by the district court. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1413, 1428 (5th Cir. 1996).

Signed October 6, 2006

/S/ John W. Primomo
JOHN W. PRIMOMO
United States Magistrate Judge

APPENDIX E

[December 13, 2005 deposition of Lauren Browning.]

[242] management that you felt you had been discriminated against because of your sex; is that correct ?

A. You asked me for specific phrases, had I said those specific phrases, and I answered the questions.

Q. Correctly?

A. —correctly. Yes.

Q. And are you believing you need to amend that answer now?

A. No, not those answers. I answered those questions correctly, but—

Q. Is it—let me ask the question again. Did you ever tell SwRi management that you felt you were being discriminated against because of your sex?

A. I never ever used those words.

Q. Did you ever tell SwRI management that you felt you had been discriminated against because of your race, sex, national origin, disability or age?

A. Never used those words.

Q. Did you ever tell SwRI management that you felt you had been discriminated against because of your gender?

A. I never used those words "I've been discriminated against because of my gender."

Q. Did you ever tell SwRI management that you felt you had been retaliated against because you had made a complaint of discrimination based on your sex?

[243] A. Can you repeat the question.

Q. Did you ever tell SwRI management that you felt you had been retaliated against because of complaints—did you ever tell SwRI management that you felt you had been retaliated against because you

made any complaint of discrimination based on sex?

A. No.

Q. Are there other words you contend you use that would have related the message that you felt you were being discriminated against?

A. Yes.

Q. What was that?

A. In 2001, I—in my discussion with English Pearcy when I presented to him the graph and the salary survey information, I pointed out to him that women were underpaid relative to men with the same experience in this national survey and in this regional survey, and that I wondered if that was what was happening to me.

Q. What did Mr. Pearcy say?

A. He said that I was crazy if I thought that.

Q. That's all the questions I have. Do you have anything else you want to amend?

A. Well, there was one other incident similar to that in which I used different words. In I think it was my 2003 performance evaluation—it might have been 2004—2003 or [244] 2004—I have to think about. Performance evaluation discussion with English Pearcy—I think it was 2004. He said that I had—that my evaluations were trending downward in part because I had had difficulty or problems working—alleged problems working with some of the other staff members. And I said to him that I could think of several people who had difficulties—several men who had difficulties working with other men here and that that did not seem to hamper their progress up the SwRI career ladder or cause them to have a low rank in salary, but that it had—had that result for me. And I asked him why.

Q. What did Dr. Pearcy say?

A. He said that—that they were different.

Q. How well did you know Debra Hughson?

A. At the time that she worked there?

Q. At the time she worked there, yes.

A. Not very well.

Q. Did she have a reputation for being hard to work with as well?

A. I—I don t know what her reputation was.

Q. Did you ever hear that?

A. No. While she was working there I never heard that.

Q. Do you know if she had any conflicts with others?

A. No.

[245] Q. Did Ms. Hughson ever indicate to you that she felt her progress had been hampered by any issue of sex discrimination.

A. We never talked about it, no.

Q. That's not my question.

A. No.

Q. She never did?

A. No.

Q. Anything else?

A. Not that I can think of, no.

MS. BENEDICT: Finish up.

THE VIDEOGRAPHER: Off the record, 6:17 p.m.

* * * * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-05-CA-0245-XR

LAUREN BROWNING,
Plaintiff,

vs.

SOUTHWEST RESEARCH INSTITUTE,
Defendant.

AFFIDAVIT OF LAUREN BROWNING

STATE OF TEXAS)

COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, on this day personally appeared LAUREN BROWNING, who, after being sworn upon her oath, states as follows:

"I make the following declaration subject to the penalties for perjury·

1. My name is Lauren Browning. I reside in San Antonio, Bexar County, Texas. I am over twenty-one years of age. I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

2. I am an experienced Geochemist and former female employee of the Defendant Southwest Research Institute ("SwRI") in it Center for Nuclear Regulatory Waste Analyses (the "Center). Three

years after obtaining my Ph.D., I sought and obtained employment at the Center as a Research Scientist in the Geohydrology and Geochemistry Element of the Center, reporting to Element Manager, English Pearcy.

3. From December 7, 1998 to May 21, 2004, I was employed by SwRI as a Research Scientist (SE-2). By late 2001, I had already been performing at the level of a Senior Research Scientist (SE-3), according to the June SwRI 1999 Career Ladders and Job Guidelines (reissued with no change to the SE-2 through SE-5 job guidelines in December 2003, see Exhibit 9 of Appendix in Support of Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment and Brief in Support).

4. Before joining SwRI, I received my Bachelor's of Science in Geology at the University of Texas in 1990 and obtained my Ph.D. in Geosciences from the University of Tennessee in 1995. By the time I joined the Center, I had completed more than three years of postdoctoral work and gained considerable experience in the earth sciences and modeling techniques used at the Center. Including the work I performed while I was going to graduate school, for example, I had approximately eight years' experience in geochemical modeling, a predictive scientific technique used extensively at the Center and a required skill set for Geochemists at the Center.

5. Robert Pabalan made highly critical and unwarranted comments about my work in from of other staff members (Drs. Gusatavo Cragnolino and David Pickett) after a business conference. When it was suggested that Pabalan help me instead of criticizing me, Pabalan snatched my wine glass away from my plate and stated, "I'll help Dr. Browning—no more

wine for you, Dr. Browning." At the time Pabalan said this I was drinking from the one glass of wine I had with dinner that evening. I reported this humiliating incident to my Element Manager, English Pearcy. However, Pearcy took no steps to help me and did not forward my complaint to Human Resources.

6. Pabalan's verbal attacks on me continued and intensified throughout my career with SwRI. I continued to apprise Pearcy of the escalating attacks and I also attempted to resolve the situation on my own. However, despite my attempts to utilize SwRI's "Open Door Policy," Pearcy did nothing to address or attempt to alleviate the situation.

7. On April 12, 2002, Pearcy reprimanded me for making a trip on my own time and at my own expense to attend a meeting at which I hoped to promote SwRI's efforts to obtain contracts for work with other clients other than the Center's primary client, the NRC. Pearcy also accused me of making fraudulent entries on my timecard. However, in addition to the trip and other work that I did without charge for SwRI, I also worked every hour for the NRC client that I indicated on my timecard during that time period. Pearcy and/or Wes Patrick changed my timecard to incorrectly reflect a bill to a cost center for which I did not work on April 12, 2002. The effect of my supervisors altering my timecard was to make my personal self-funded trip appear to be an official SwRI business trip. Pearcy and Patrick then used this to allege that I had violated Defendant's travel policies.

8. On the back of the performance evaluation I was given in early 2003, I wrote that I believed the appropriateness of management's response to my

concerns about my pay being less than my male peers "warrants scrutiny." I wrote this because I believed that the actions of management in the Center with respect to my pay was violating a law or a right that I had to equal pay, and because the expressions of concern I made in 2001, 2002 and on my self-evaluation in early 2003 appeared to have been ignored.

9. The Center's President, Wes Patrick, responded to my note by coming to my office in early February 2003 to confront me about what I had written. It was rare for Patrick to visit me and I did not expect this visit. The surprise of Patrick's visit combined with his demeanor was intimidating to me. Patrick was clearly livid that I dared suggest that SwRI was doing anything wrong. He also threatened my job saying that he could fire me right then and there, for cause and reminding me that Texas was a right to work state.

10. In January 2002, January 2003 and January 2004, months in which I published my complaints about unequal pay, all the Research Scientists, Senior Research Scientists, Principal Scientists and Staff Scientists working for the Center were men. Melissa Nugent was once a Scientist, one level below mine, and was never promoted to Research Scientist. I left the Center before January 2002. Debra Hughson was a Research Scientist and/or Senior Research Scientist during part of the time that I was employed at the Center. However, like Ms. Nugent, Dr. Hughson resigned from SARI before January 2002. Sarah Gonzales, who received her Master's degree in 2003, was hired by SwRI and began working at the Center as a Research Scientist in or around August 2003. Ms. Gonzales was not employed at the Center when I presented my complaints about unequal pay in January 2002 and January 2003.

11. On January 30, 2004, Pearcy told me over the telephone that he was removing me from the leadership role on the Q & C ISI. I later learned that he replaced me with David Pickett. Pearcy cited vague complaints about my work but was unable to articulate a single specific complaint or its source. Pearcy simply accused me of "talking to much" at meetings and said that I took to much credit for work on the ISI.

APPENDIX G

Re: Feb. 2002

One incident within the context of my yearly performance evaluation last year (ie. In 2002) was that my boss ECP said:

> 'What you have to realize is that it doesn't <u>have</u> to be fair. Management decisions don't have to be fair. We are management. You are the employee. We make the rules, and you follow them. It's as simple as that. And if you don't think that what we are doing is fair, then there is the door. [he points]'

This statement is close to verbatim.

Open door policy? OPP

APPENDIX H

Open door?
continued Ethics 9 Feb. 2003

Within a few weeks afterwards, at the most, I went in to talk with ECP about this. I said that some people were concerned that we may be doing something unethical by hiding the fact that we had NRC/CNWRA/DOE teleconferences about technical exchange issues, and were told not to mention it in the technical exchange.

ECP relied, "If you or anyone else thinks that something unethical is going on around here, then I suggest that you avail yourselves of the free psychiatric services provided by the Institute."

Late in 2002, the State of Nevada issued a complaint against the NRC that ~~it~~ the NRC had held clandestine business meetings with the DOE in preparation for the NRC/DOE/CNWRA technical conferences.

APPENDIX I

[March 9, 2006 deposition of English Pearcy]

[142] **[Illegible]**

Q. Are you saying that she stated on her time card that she was working on a federal government project during the work hours, eight to five, or at some point during the day?

A. She stated that she did eight hour of work on a federal government contact on that day

Q. Okay. Do you have any proof that she did not?

A. I have no—She had no authorization to do her work at any lime other than the nominal expected work hours.

Q. That's a somewhat different question, though. Do you have any proof that Lauren did not complete eight hours towards a federal government project at some point during that day?

A. No I have no proof that she did not sometime during that day do eight hours of work on that contract.

Q. And in wanting her to change her time card, didn't you indicate to her by e-mail that you believed she had committed fraud against the federal government?

A. Failure to indicate your time accurately is in violation of federal acquisition regulations.

Q. Okay. But had she completed the eight hours of work at whatever time during that day as she said that she did, that would not be in violation, correct?

A. Our time cards closed before she did—before she could have done eight hours of work at the time our time [143] cards were closed, she could not have done the eight hours of work that she planned to do without authorization.

Q. How does a scientist who is traveling indicate their time? Can't they estimate their time in advance if they know they're going to be out of town when time cards close?

A. They can estimate their time in advance. They can also call their manager and, with their manager's concurrence, the manager can enter time for them.

Q. And so, if—can you understand that somebody would not want to claim time worked or change a time card when they believed that changing it would be federal fraud?

A. I'm not sure that I understand your question.

Q. Lauren believed or Lauren indicated that she worked eight hours for the federal government project on her time card, correct?

A. Yes.

Q. And to the best of your knowledge she did, correct?

A. I have no proof that she didn't.

Q. Okay. And what—why did you want her to change her time card? Where were you asking her to move her time from to?

A. To be consistent with management direction in the absence of permission to travel and the absence of permission to shift her time for the bulk of a business day to some other time, in the absence of that permission, we wanted her to shift her time from the federal government contact to an overhead [144] **[Illegible]**

Q. If an employee had spent eight hours on a federal government contract, you can under stand the reluctance to want to move that time had they actually done the work?

A. Do I understand?

Q. Right. Can you understand that somebody would be reluctant to move time actually worked on a

federal government government contract to a different account?

A. I understand that she may have been in error and needed to consult with management about how to accurately record her time

Q. Has any male scientist in the center received a downgrade in their performance ranking due to lack of positive attitude?

A. I can't recall.

Q. And what in particular, when you're looking at Exhibit 9, does the reference to positive attitude refer to?

A. That's actually a bright spot on this evaluation, that sentence, and the reason it's the last sentence is that whereas I don't recall the particulars, she had demonstrated an improvement in this area relative to the prior ones. And that's the idea or that sentence is to encourage her to continue to develop and sustain a positive attitude.

There had been some change in a positive way [145] from the earlier evaluation, and yet we wanted to continue to have her give attention to that area of her performance, and so its noted on here, but that's actually a bright spot in that paragraph.

Q. Other than the performance evaluations, in particular Exhibit 7 and Exhibit 9, did you give Lauren Browning advice on how she might be able to reach a level at which she could be promoted to senior research scientist? And can you describe to the jury what the situations were in which you gave advice outside of the performance evaluation?

A. From time to time—I can't cite a specific date and time, but from time to time I recall talking with Lauren to in other contexts in addition to those, of course, when I met with her at the time for her

performance evaluations when we had such—such exchanges, and other times I talked with her to encourage her and to try to point her toward behaviors and performance that would lead to the potential for promotion, but I can't cite a specific date and time.

Q. Okay. And did Lauren come to speak with you at some point after receiving her performance evaluation dated January 29, 2003?

A. Perhaps. I don't recall.

Q. Do you recall Lauren ever complaining to you that she thought that the evaluation was unfair?

A. I recall her writing on some time shortly after this

* * * *

[154] ISI lead of the quantity and chemical ISI.

A. Quantity chemistry.

Q. Chemistry. I'm sorry I keep getting that wrong. At some point Lauren Browning was removed from the ISI lead—from the lead of the quantity and chemistry ISI, correct?

A. That's correct.

Q. And when did that occur?

A. I'm not sure precisely when that occurred, but the best I can do right now is in early 2004, maybe around the end of January or the first part of February. I can't be precise right now.

Q. Okay. And who made the decision to remove Lauren from the lead of this ISI?

A. I made that decision in consultation with Budhi Sagar.

Q. And what precipitated the removal of Lauren from the lead of this ISI?

A. Whereas Lauren's technical work in many ways continued to be quite good as noted on her per-

formance evaluations, we became concerned that she was not as in touch programmatically as she should be and we lost confidence in her ability to serve in that role.

Q. And if you could explain for the jury, what does it mean or what do you mean by not being in touch programmatically?

[155] A. The term programmatic is used by the Nuclear Regulatory Commission and used by us in our work with the Nuclear Regulatory Commission in particular to refer to agency goals and direction, the nuances of regulatory language, the nuances, the emphases that are important to the Nuclear Regulatory Commission, the ways that they want to advance and structure their work, things that are important to the agency, and they provide the context in which technical work occurs.

Q. Had anyone complained to you regarding Laurens work as the lead at the quantity and chemistry ISI?

A. Budhi and I had discussed that. I can't say whether he came to me initially with a complaint or not, but I recall taking with Budhi about that.

Q. What do you recall about your conversation with Budhi?

A. That we were concerned at her ability to continuing in that role.

Q. But your conversation was not necessarily about complaints that you had heard?

A. No.

Q. Okay. Did you seek input from the NRC before making the decision to remove Lauren from the quantity and chemistry ISI?

A. No Were not in the habit of asking the NRC with regard to our stall assignments. That would be inappropriate.

[156] Q. Before making the decision official to remove Lauren from the quantity and chemical industry ISI lead, did you talk to folks at the NRC to see if what your concerns were were verified through their perceptions of her work?

A. No I don't recall any such communications.

Q. Wasn't in fact Lauren's work with the NRC commended by her contacts there?

A. From time to time over the years they did commend her work. I recall, however, an occasion when Bret Leslie, an NRC technical staff member, gave a training session on the fourth floor of the library at SwRI where he was training us in a programmatic issue of importance to the Nuclear Regulatory Commission with regard to risk significance and risk in forming our work, at the end of which, after he gave a slide presentation and coached us in the importance to the agency of risk in forming our work.

At the end of that training session, Lauren spoke strongly, clearly and to my ears loudly that she saw no particular value in what he had been trying to coach us toward. Alter that exchange, that representative of the Nuclear Regulatory Commission suppressed dismay.

Q. When did that occur?

A. I don't recall the date of that.

Q. Do you recall the year?

A. I can't say with certainty. My best guess is 2003

[157] Q. Okay.

THE VIDEOGRAPHER: Change the tape now.

MS. FEDELE: Okay.

THE VIDEOGRAPHER: Off the record, 5:42.

(Recess from 5:42 to 5:43)

THE VIDEOGRAPHER: Back at record. It's 5:43.

Q. (BY MS. FEDELE) Wasn't It true in fact that Lauren's contacts at the NRC had commended her work as recently as December of 2003?

A. Perhaps. I don't recall that specifically.

Q. Did you give Lauren any warning that her position as lead of the quantity and chemistry ISI was in any way in jeopardy?

A. I don't recall that we discussed that in advance, no.

Q. And then when you—when you took Lauren off of the lead of the quantity and chemistry ISI, who took over after Lauren?

A. That was David Pickett.

Q. What was David Pickett's rank when he first took on the lead of the quantity and chemistry ISI?

A. I believe—I believe that David Pickett was a senior research scientist at that time.

Q. Do you know what his salary was at the time that he took on the ISI lead?

A. No.

[158] Q. was the quantity and chemistry ISI the first risk significant ISI that Pickett had ever led?

A. My recollection is that he had another role prior to that in another ISI, each of which are risk significant.

Q. Okay.

A. That's why they're ISIs.

Q. So, he had in fact led another ISI prior to taking this one on?

A. I can't recall clearly light now.

Q. Okay. Had David Pickett been a contributor to either the technical or programmatic component of the quantity and chemistry ISI during any of the years that Lauren Browning led it?

A. Could you repeat that, please?

Q. Sure. Did David Pickett contribute either programmatically or technically to the quantity and chemistry ISI at any time that Lauren Browning led the ISI?

A. I don't know.

Q. Okay. What led you to choose David Pickett then to become the quantity and chemistry ISI lead?

A. I don't remember all of the factors and the particular sets of things that I was trying to balance at that time But having determined to make a change. I selected David to do that in the same way that we from time to time change our leads to the ISIs and the KTIs.

[159] Prior to the ISIs, we make changes as appropriate in light of load balancing, in light of staff departures, in light of other work needs that pull people one way and another, we make changes from time to time over the years in them ISI and KTI roles. That happens.

Q. And when you say we who are you referring to?

A. The management of the center.

Q. Is that the managers and directors group that you discussed earlier?

A. No. That's not typically part of our performance evaluation process, though it can be and has been at times. The decisions are taken more among a smaller group of managers in consultation with Budhi and Wes as appropriate.

Q. Do these consultations typically involve all of the managers or—that's my question actually. Does it typically involve all of the managers?

A. No. They would most often involve some subset of the management group.

Q. And the subset would be those managers who are most closely involved with the ISI; is that accurate?

A. That's correct. We employ a matrix management structure wherein I am responsible as a line manager for a certain set of technical staff. I'm also responsible as a project manager for a certain set of project activities, in this case the ISIs. There are others.

[160] The staff who lead or do technical work in support of ISIs, again in this case may be from my group or they may be from another manager's line management group. I need to make a change that would affect someone who is in a reports to a give manager, we would get together and talk about it at and work out something that made sense to us, and then we would consult with Budhi or Wes as appropriate to make sure that they didn't see any problem with that, and then the change would be communicated to the staff.

Q. And did you communicate—when you communicated to Lauren Browning that you were reassigning the ISI lead, what did you tell her the reasons were for that?

A. I don't recall the details I can't quote you what I what I said. The essence of what I recall communicating was that we had lost confidence in her ability to do that in a manner that we were sure of and that we needed to make a change.

Q. And what was the basis of your loss of confidence?

A. She appeared increasingly focused on activity other than programmatic responsibilities to the Nuclear Regulatory Commission. She was not—through 2003 she began to not attend the Yucca mountain team meetings as regularly as she had in the past, such that I noted that on her January 2004

performance evaluation, it my memory serves me correctly, and called that out in January of 2004 as a point of concern from [161] her diminished participation in that meeting during 2003; and that coupled with my other observations and with—concurring with Budhi's observations, we felt that we wanted to make a change.

Q. And when you say other observations, what specifically were those other observations?

A. That she was focused on other activities, not so much on the NRC programmatics.

Q. Was there anything else that you observed besides that?

A. No. Her technical work continued to be good.

Q. And as far as her attendance at the Yucca Mountain meetings, you said those were becoming less frequent in 2003?

A. Yes.

Q. Did you communicate with her at any time during 2003 your concern about her attendance or lack thereof at the Yucca Mountain meetings?

A. I can't point to a specific meeting or date, but it's my habit to communicate in advance of formal evaluations so that staff are not surprised. We look for every opportunity to point staff toward ways to improve; that's why it's phrased opportunities to improve your job performance on the E-15 forms, and we do our best with each of our staff to coach them to improve against the negatives that emerge.

Lauren's technical work had been strong from the

* * * *

[166] [**Illegible**] are typically, you know a couple of hundred pages or so documents, and we review them on behalf or the Nuclear Regulatory Commission when they're produced and when they're needed to be

renewed in support of our evaluation of the Department of Energy work.

Q. Okay. And so Lauren Browning was working on a technical review of this TB doc 05 at one point and she ceased to; is that correct?

A. That's Correct.

Q. And what was the reason that she ceased to work or ceased to lead the ongoing technical review of the TB doc 5?

A. My recollection is that she removed herself from that and said she didn't want to continue.

Q. About when did that occur?

A. Again, I can't give a specific date, but it was early in 2004 as best I recall.

Q. And are you sure that she removed herself from this project?

A. That's my recollection

Q. Who would Lauren have reported to regarding her work on the technical review of TBDoc 5?

A. I'm not sure what you mean by reported to.

Q. Who at the center would she have kept apprised of her work on the TBDoc 5?

[167] A. Me.

Q. Okay.

(Exhibit 10 marked)

Q. English I'm handing you what's been marked as Exhibit 10. Do you recognize Exhibit 10? Do you recognize Exhibit 10?

A. Yes.

Q. And what is it, please?

A. It's Lauren Browning's performance evaluation for the period February 2003 to January 2004.

Q. And in the strongest areas of job performance near the end of that paragraph, it refers to Lauren's work leading ongoing technical review of the DOE

TBDoc on In-Drift Chemical Environment. Is that the TBDoc 5 that we've just been talking about?

A. Yes.

Q. So then as of January 29, 2004, she was still performing that function, correct?

A. That appears to be correct.

Q. I'm looking at the second paragraph about business travel arrangements bypassing institute procedures. What does this—what does this refer to?

A. The institute requires that travel arrangements be made through the Institute travel office.

Q. And what travel did Lauren take that was not [168] instituted through the travel office?

A. I don't recall which trip that was.

Q. Do you know for a fact that it was more than one trip?

A. I believe that's the case.

Q. Okay.

A. But I can't enumerate trips.

Q. Had other scientists in the center made business travel arrangements without using the institute travel office?

A. I can't say for sure who and when, but it seems to me likely that at some time someone did.

Q. And would that have been something that would have been noted on their performance evaluations as well?

A. It depends on the degree, as we discussed in another context, with interpersonal relations It depends on a matter of degree whether it shows up on here or not.

Q. Okay. The next portion of that second paragraph talks about Lauren's technical reviews. Can you explain to the jury what that remark refers to?

A. I don't recall specifically what that refers to. My recollection is that someone or someones at our group meeting expressed that.

Q. So, you don't recall who mentioned that?

A. No.

Q. At the time that this performance evaluation was [169] given to Lauren Browning, did she know yet that she was being removed from the quantity and chemistry ISI lead?

A. My recollection is that that occurred after this, but I'm not sure of the date.

Q. And how did Lauren Browning's removal from the lead of that ISI affect her job duties?

A. In a limited way it changed the responsibility for being the principal contact with the Nuclear Regulatory Commission. She continued to work on that ISI. She continued to do work in that area but was no longer responsible for being the principal contact with the client.

Q. Would it be fair to say that her responsibilities were significantly decreased?

A. No. Her work remained substantially similar, only changing the responsibility for interacting as the lead with the NRC.

Q. So, you're saying that she had the same amount of workload as before?

A. I suspect that the—and I can't specify quantitatively, but I suspect that the number of hours that she billed for that project were comparable before and after that change.

Q. Is it your testimony then that the lead of an ISI does not, as lead, have to put in any more hours than someone who's simply working in support of the ISI?

[170] A. No I think most leads do put in more time than others. In this case my recollection is that Lauren continued to work on the ISI in much —at much the same level as she had before.

Q. Was Lauren given any new assignments to offset any potential loss of work from the ISI lead?

A. No, she was not given new assignments. Part of the reason for the change was that she wasn't giving adequate attention to those aspects of the responsibility, so we didn't add to her workload when we made that change.

MS. FEDELE. Object as nonresponsive to everything after No.

Q. Looking back again at Exhibit 10, there is a comment about avoiding gratuitous derogatory remarks about the contributions of her coworkers. Can you explain to the jury what this is in reference to?

A. The first part of that sentence notes that her attitude and approach to work have improved but require sustained attention to assure positive and professional interactions. That refers to our desire that she continue to give particular attention to those aspects of her performance, specifically avoiding comments that belittle or reduce the contributions of her coworkers.

Q. Are you looking at Exhibit 10?

A. Yes.

[171] Q. The one dated January 29, 2004?

A. Yes.

Q. The second paragraph?

A. Yes.

Q. Okay. Were you reading from—

A. In part.

Q. Okay. Because I was following along and I didn't notice all of that.

A. Uh-huh.

Q. Okay. And can you teal me what comments that you were made aware of or that you heard that you found to be derogatory and who were they made about?

A. I don't recall specific comments, but I would draw your attention again to the fact that whatever they—the context there is to draw her sustained attention to the need to avoid those kind of things.

Having noted that her attitude and approach have improved, we're simply trying here to call her attention to the need to sustain that improvement that we have recorded here. This is intended to be part of our coaching to help move away from the difficulties that she had had in the past.

Q. Okay. So, that remark on Exhibit 10 does not necessarily mean- that she was making gratuitous derogatory remarks about contributions of her coworkers; is that correct?

A. I don't recall any specific comments.

[172] Q. Okay. If you'll look at Exhibit 7, please, and go ahead and pull out Exhibit 9 as well.

A. Seven and nine.

Q. Seven, nine and ten, uh-huh.

A. Nine and ten.

Q. Paragraph 2 of Exhibit 7 mentions gratuitous negative comments. Paragraph 2 of Exhibit 9 indicates an improvement in attitude.

A. Yes.

Q. And it does not mention negative comments.

A. Yes.

Q. And so on Exhibit 10, the second paragraph, would you agree with me that the remarks, that she should avoid gratuitous derogatory remarks, indicates that someone in the evaluation group thought that she was?

A. That may be. I don't recall specifically, but this was the end result of that process.

Q. Okay. But you have no recollection of the specific comments or why this is even there?

A. Well it's there to encourage her to avoid those kind of things.

Q. Okay. Are you aware of any male scientist at the center who exceeded their per diem while on business travel?

A. I can't recall any specific occurrences to name.

Q. Okay.

[173] (Exhibit 11 marked)

(Exhibit 12 marked)

(Exhibit 13 marked)

(Exhibit 14 marked)

Q. After Lauren's performance evaluation which occurred in January of 2004, did you meet with her regarding her performance as a follow-up?

A. Yes.

Q. Do you retail how many times?

A. No, I don't.

Q. I'm going to be handing you what's been marked as Exhibits 11 through 14. Make sure they're all there. Turning to Exhibit 11, are these your handwritten notes?

A. Yes.

Q. And are they notes of the meeting with Lauren regarding her performance?

A. They're notes of a meeting between me and Lauren where we discussed the status of hiring a new geochemist, and we discussed conflict of interest issues for a geochemist.

Q. And at the end it indicates—your notes say that LBB said, "Well, It doesn't really matter much to me because I won't work with her anyway." What's that in reference to?

A. Lauren was not happy at the prospect that we might hire Jude McMurry, and that statement reflects her displeasure at the prospect that Jude might come join our staff. She had

* * * *

APPENDIX J

[Exhibit 38]

[Logo] Southwest Research Institute
Performance Evaluation Summary

[Entered May 15, 2001]

NAME: Lauren Browning

DATE: February 1, 2001

JOB TITLE: Research Scientist

EMP. NO.: 11450

CC: 20

REVIEW PERIOD: February 2000 *to* February 2001

Strongest Areas of Job Performance: During this review period, Dr. Browning made strong contributions to the ENFE KTI through geochemical modeling of thermal-hydrologic-chemical evolution of near-field water chemistry and related reviews of numerous DOE documents. She provided exceptional support to the ENFE NRC/DOE technical exchange, in the absence of more senior geochemistry staff. The NRC has commended her success in mastering and effectively conveying a wide range of information important to the ENFE KTI. In addition to ENFE work, Dr. Browning has supported many other KTIs with chemical calculations and insights. Beyond her formal client work, she fed a successful effort to evaluate and document CNWRA usage and needs for UNIX computing resources. In this role, Dr. Browning demonstrated considerable skill and patience in handling sometimes contentious personalities. Dr. Browning has continued to be active in the scientific peer community, publishing multiple journal papers and: abstracts, making several pres-

entations at major conferences, and organizing a special session at GSA.

Opportunities to Improve Job Performance: Lauren should continue to seek out technical leadership opportunities for the NRC and other clients. She should strive to use her excellent writing abilities to support CNWRA business development.

Overall Job Performance Summary: Exceeds Expectations

Overall Employee Satisfaction with Job and Work Relationships:

"Overall satisfaction: with my job remains Unchanged since last year. I have an excellent job. I work on interesting and socially relevant problems with intelligent creative, and friendly colleagues. The management provides me information and support in a forthright and responsible fashion, and through continued collaboration. I am able to pursue my interests in planetary science research. I appreciate the perspective and words of encouragement that English Pearcy provides me."

Short and Long Term Career Goals:

—Strive to prioritize work and to be more efficient in completing tasks.
—Emphasize the programmatic significance of technical tasks and work toward closing the ENFE KTI.
—Help develop and conduct a MULTIFLO workshop at NRC.
—Seek opportunities to help write proposals for new work and to prepare promotional materials.
—Participate in a formal staff exchange at the NRC.

—Submit all milestones on time.
—Keep time card current.

Developmental Recommendations: Lauren should identify and participate in an industry-oriented conference to improve understanding of potential real-world MULTIFLO applications.

/s/ E. C. Pearcy, 8903
Prepared by

/s/ Budhi Sagar, 2/9/2001
Reviewed by (optional)

/s/ Wesley Patrick
Cost Center Head

2/9/2001

I have reviewed and discussed this evaluation with my immediate supervisor; I may or may not agree with this evaluation. Any additional comments I have are on the reverse side.

/s/ Lauren Browning
Employee

[Exhibit 39]

[Logo] Southwest Research Institute
Performance Evaluation Summary

[Entered Feb 14 2002]

NAME: Lauren Browning

DATE: January 29, 2002

JOB TITLE: Research Scientist

EMP. NO.: 11450

CC: 20

REVIEW PERIOD: February 2001 to January 2002

Strongest Areas of Job Performance: During this review period, Dr. Browning continued to lead the Integrated Subissue on Quantity and Chemistry of Water Contacting the Waste Package and Waste Form. In that role, she responded effectively to repeated requests for analysis and evaluation from the NRC. Notably, she wrote significant sections of the Integrated Issue Resolution Status Report and the Sufficiency Comments, and she contributed to designing and planning for the next revision of the Total Performance Assessment code. Lauren continues to serve as the CNWRA lead for reactive transport modeling for ENFE and is editing a special volume of Computers & Geosciences on reactive transport. Browning makes time to consult with numerous internal groups that seek her chemistry and mineralogy input for their projects, including TEF, CLST, RDTME, and USFIC. For TEF, she is leading the effort to more fully integrate coupled processes into the cold trap experiment by adding chemistry and materials aspects, and ensuring that quality assurance requirements are fulfilled. In addition to her technical work, Dr. Browning has demonstrated consider-

able business development initiative with contributions to some half dozen efforts as well as development of promotional literature.

Opportunities to Improve Job Performance: Lauren should strive to cultivate a positive "can do" attitude. She should refrain from making gratuitous, negative comments about her colleagues. She should avoid discussing CNWRA internal matters with our clients.

Overall Job Performance Summary: Exceeds Expectations (-)

Overall Employee Satisfaction with Job and Work Relationships:

"My overall satisfaction with my job and work relations has changed significantly from last year. For the first half of the year, I was fully engaged in programmatic issues related to the high level waste program. I have gained the trust, respect and acceptance of most people that I worked with at the Center, the NRC, and the DOE. From these experiences I also learned, in many cases the hard way, about the limits of my role within the program. And, I watched sadly as some of our best and brightest colleagues left the Center to realize professional opportunities elsewhere. Despite the inherent frustrations associated with working on a very complex issue with a large number of people who have very different agendas, I have firmly concluded that the work that I do for the NRC is important, and that I am precisely the "right" person to be doing it. I am the "right" person for my job, because I have the appropriate technical skills, ability to speak and write effectively, professional integrity, and demonstrated ability to make allies of colleagues with "strong personalities" and equally impressive professional talents. How do I translate

this into a pithy statement about my overall job satisfaction? . . . With much appreciated help from D. Hughson, W. Murphy, C. Manepally, R. Janetzke, S. Painter, and others, I have successfully developed a well-rounded and capable team that I am confident will continue to gain the recognition and respect from the larger reactive transport community. I therefore have a high degree of satisfaction with technical work that I do at the Center. I feel, however, that I am under-compensated for the nature and extent of the benefits that I bring to the table on behalf of our NRC client, relative to my peers. I ask that you please consider this anew, and find a protocol to make the appropriate salary and status adjustments." [full statement is recorded on L. Browning's self evaluation]

Short and Long Term Career Goals:

—Publish work in peer-reviewed journals as first author.

—Demonstrate a more positive and constructive attitude toward colleagues, including IMS staff. - Continue to be efficient in completing tasks.

—Obtain a WFO project.

—Participate in a formal staff exchange at the NRC.

—Submit all milestones on time.

—Keep time card current.

Developmental Recommendations: Lauren should identify and participate in an industry-oriented conference to improve our understanding of potential real-world MULTIFLO applications.

/s/ E. C. Pearcy, 8903
Prepared by

/s/ Budhi Sagar, 2/1/2002
Reviewed by (optional)

/s/ Wesley Patrick
Cost Center Head, 2/11/2002

I have reviewed and discussed this evaluation with my immediate supervisor; I may or may not agree with this evaluation. Any additional comments I have are on the reverse side.

/s/ Lauren Browning
Employee

See Attached

[Logo] Southwest Research Institute
Performance Evaluation Summary

[Entered Feb. 21, 2003]

NAME: Lauren Browning

DATE: January 29, 2003

JOB TITLE: Research Scientist

EMP. NO.: 11450

CC: 20

REVIEW PERIOD: February 2002 to January 2003

Strongest Areas of Job Performance: During this review period, Dr. Browning devoted considerable effort to co-editing a special volume of *Computers & Geosciences* and co-authoring a paper for that volume describing her reactive transport model of the Yucca Mountain geochemical system. In this effort, she successfully coordinated the contribution of numerous authors and improved the quality of the volume through careful editing and reviews. In addition to her paper for that volume, Lauren contributed as a co-author on numerous abstracts and papers on a variety of topics. Dr. Browning has been active in our Mars initiative, co-authoring two Mars-related abstracts, inviting speakers for our Mars lecture series, helping to identify advisor committee members, and seeking out opportunities to collaborate to develop new Mars projects. She co-chaired a topical session at the Geological Society of America annual meeting. Lauren provided significant support to ENFE deliquescent investigations, input to the TEF cold-trap experiments, and support for development of TPA 5.0. Notably, her general attitude was markedly improved during this period.

Opportunities to Improve Job Performance: Lauren should continue to develop and sustain a positive attitude. She should follow management directions and Institute procedures at all times. During this review period Lauren made an unauthorized business trip, and her time card was not completed accurately for the period of the trip. Lauren refused to reconcile her time card appropriately requiring management action. Whereas Lauren has made significant contributions to our Mars efforts, it should be noted that she was initially quite reluctant to participate.

Overall Job Performance Summary: Meets Expectations(–)

Overall Employee Satisfaction with Job and Work Relationships:

"This has been an exceptional year for me. I have authored or co-authored 12 different abstracts, 4 peer-reviewed articles, at least five different Center milestones, and two internal QA reports. In addition, I planned and designed major activities related to ENFE subissue 2 and the Quantity and Chemistry ISI related to coupled THC processes and in drift chemical environment, coordinating staff contributions from the ENFE, TEF, CLST, and PA elements. This year, I continued to lead the Center's efforts to evaluate coupled THC processes at YM by developing extensive reactive transport simulations of YM using MULTIFLO, and by using these and other criteria to test the reliability of the DOE's coupled THC models. I also served a the lead Guest Editor for a Special Issue of the international journal *Computers & Geosciences*, entitled "Reactive Transport in the Geosciences". This effort increased my international visibility in the highly specialized technical field of reac-

tive transport modeling and code development significantly because my managerial role required frequent interactions with 28 contributing authors from several different countries and about two dozen technical reviewers. Many positive interactions with colleagues at conferences also contributed favorably to my professional standing in the reactive transport field. Also this year, I worked directly with two senior consultants (i.e. W. Murphy an M. Seth) on NRC project, served as a mentor to Chandrika Manepally, and had significant technical interactions with members of the ENFE, TEF MT, and PA KTIs. I have worked closely with the several different NRC staff members, who have consistently received my technical and programmatic efforts very favorably.

Furthermore, I have been one of the most active and successful proponents of the Center's involvement in SwIM, having designed and led the geochemistry portion of a funded SwIM proposal. In addition, I provided comprehensive recommendations for SwIM advisory Board positions, invited and hosted prestigious SwIM presentation speakers from the UK and NASA-Johnson Space Center (JSC), and published two conference abstracts. I am currently working with a member of the Mars Odyssey Gamma-Ray Spectrometry Team, and have accepted an invitation to visit NASA-JSC to discuss my involvement in further planetary science projects and Mars missions. I have also served as an external technical reviewer on multiple NASA grant proposals submitted to three different NASA programs (the Cosmochemistry, Origins of Solar Systems, and Astrobiology Programs), and reviewed various articles submitted to international journals in the planetary science field. Several of the proposals and journal articles that I reviewed were designed around my previously published planetary

science work. At the present time, I have nearly nine years of experience as a successful member of the planetary science community, and I have been using this visibility to further the SwIM effort. The majority of my Mars-related work this year was performed at no charge.

My high motivation level, extensive experience, and wide range of capabilities are clearly demonstrated by the nature and diversity of my professional accomplishments. Taking all this into account, please support my promotion to the appropriate level technical position for an extremely accomplished Ph.D. in her eighth year of post graduate work."

—*Short and Long Term Career Goals:*

—Continue to demonstrate a positive and constructive attitude.

—Focus main efforts on NRC deliverables.

—Continue WFO activities (especially SwIM).

—Continue to publish work in peer-reviewed journals as first author.

—Submit all milestones on time.

—Keep time card current

Developmental Recommendations: Lauren should identify and participate in a workshop or other training that would help us reach our SwIM goals.

/s/ E. C. Pearcy, 8903
Prepared by

/s/ Budhi Sagar, 2/9/2001
Reviewed by (optional)

/s/ Wesley Patrick
Cost Center Head

I have reviewed and discussed this evaluation with my immediate supervisor; I may or may not agree with this evaluation. Any additional comments I have are on the reverse side.

/s/ Lauren Browning 2-9-03
Employee

See Comments on reverse

[Exhibit 41]

[logo] Southwest Research Institute
Performance Evaluation Summary

[Entered Feb. 26, 2004]

NAME: Lauren Browning

DATE: January 29, 2004

JOB TITLE: Research Scientist

EMP. NO.: 11450

CC: 20

REVIEW PERIOD: February 2003 to January 2004

Strongest Areas of Job Performance: Dr. Browning was named as co-chair for the Materials Research Society Spring 2004 meeting. To meet that responsibility, Lauren spent much time this year coordinating and reviewing papers for presentation at the meeting. She successfully shepherded numerous authors and presenters through their preparations for this major international conference For the NRC high-level waste program, Dr. Browning contributed to development of an improved chemistry module for the Total System Performance Assessment code and provided chemistry input to the multi-KTI cold trap experiments, among other activities. She also completed software validation for the Geochemists Workbench code and contributed to our deliquescence experiments. Notably, Lauren's work leading to ongoing technical review of the DOE TBDoc on In-Drift Chemical Environment has been commended by the NRC technical leader. Dr. Browning was also named to a technical committee for the NASA oxygen initative and she is helping to coordinate the Lunar and Planetary Science Conference.

Opportunities to Improve Job Performance: During this review period, Dr. Browning at times made business travel arrangement herself, bypassing Institute procedures calling for travel reservations to be made through the Institute travel office. In the future she should follow Institute procedures for travel. In some cases, Lauren's technical reviews have lacked adequate technical rigor. She should ensure that her reviews are thorough and appropriate to the document at hand. Lauren's attitude and approach to work have improved, but require sustained attention to assure positive and professional interactions. Specifically, she should avoid gratuitous derogatory remarks about the contributions other coworkers.

Overall Job Performance Summary: Meets Expectations (–)

Overall Employee Satisfaction with Job and Work Relationships:

"This has been another exceptional year for me. I received significant external acclaim for my leadership and highly specialized technical skills in three completely different fields of research: planetary sciences, reactive transport (RT) modeling, and materials research. In the field of RT modeling, for example, I served by invitation as Guest Editor for a special issue on RT modeling in an international peer-reviewed journal, and was invited to Indiana University to give a presentation on RT modeling. The RT modeling team that I lead here at the CNWRA was also invited to submit a journal article to a special Geofluids issue being prepared by Bruce Yardley (University of Leeds) and Grant Garvin (Johns Hopkins University). In the planetary sciences, I was invited to serve a 5 year term in the scientific steering group of NASA's new "Oxygen in the Solar System

Initiative", and was also selected for the Program Committee for the 2004 International Lunar and Planetary Science Conference. I was invited to Johnson Space Center to brainstorm with a NASA scientist, Dr. Michael Zolensky, on the origin of a new meteorite. In addition to my own research accomplishments through the SwIM program, planetary research performed under my direction by a University of Hawaii Ph.D. student was favorably cited in the journal *Science*. As in previous years, I continue to perform technical reviews of NASA research grant proposals at the request of NASA's Cosmochemistry, Origins of Solar Systems, and Astrobiology Program Chairs. In materials research, I am serving as co-chair of the Organizing committee for the Spring 2004 Materials Research Society 28th annual symposium on the Scientific Basis for Nuclear Waste Management. My extensive experience, wide range of capabilities, and high motivation level are clearly demonstrated by the nature and diversity of my professional accomplishments. My success in these areas is best noted by the external acclaim that I have received for these efforts.

Within the CNWRA, I continue to successfully perform a variety of technical and programmatic tasks focused on issue resolution within the Quantity and Chemistry ISI, the most risk-significant and highly integrated component of the ENFE KTI. I am primary author of the most risk-significant set of NRC/DOE agreements related to the ENFE KTI, and have proven

* * * *

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(2)

Supreme Court, U.S.
FILED
JAN 5 - 2009
OFFICE OF THE CLERK

No. 08-599

IN THE

Supreme Court of the United States

LAUREN BROWNING,

Petitioner,

v.

SOUTHWEST RESEARCH INSTITUTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This is a factually dense employment matter in which the court below affirmed summary judgment for Respondent on all of Petitioner's claims in an unpublished, non-precedential decision.

Did the Fifth Circuit properly affirm the summary judgment by (1) drawing upon, as do all circuits, a non-exclusive set of "relevant" or "aggravating" factors as a guide to the reviewing the whole of the evidence for constructive discharge and (2) applying the standards in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) in reviewing the context-bound record for evidence of constructive discharge, retaliation and non-promotion?

RULE 29.6 STATEMENT

Southwest Research Institute has no parent corporation, and no publicly held company owns 10% or more of its stock.

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CASES:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 26, 28, 30

Aryain v. Wal-Mart Stores, 534 F.3d 473 (5th Cir. 2008) 15

Barrow v. New Orleans Steamship Ass'n, 10 F.3d 292 (5th Cir.1994) 15, 16, 17

Blackledge v. Allison, 431 U.S. 63 (1977) 28, 30

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Boumehdi v. Plastag Holding, LLC, 489 F.3d 781 (7th Cir. 2007) 32, 33

Brown v. Bunge Corp., 207 F.3d 776 (5th Cir. 2000) 15, 18

Brown v. Kinney Shoe Co., 237 F.3d 556 (5th Cir. 2001) 15

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006) ..... *passim*

Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981) ... 20

Cited Authorities

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Clowes v. Allegheny Valley Hosp., 991 F.2d 1159 (1993) 17, 18

Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3d Cir. 2001) 17

Eason v. Thaler, 73 F.3d 1322 (5th Cir. 1996) .. 28, 30

Fisher v. Forestwood Co., 525 F.3d 972 (10th Cir. 2008) 20

Huskey v. City of San Jose, 204 F.3d 893 (9th Cir. 2000) 19

Konstantopoulos v. Westvaco Corp., 112 F.3d 710 (3d Cir. 1997) 17-18

Lindsey v. One Source, No. C-05-571, 2006 WL 3360285 (S.D. Tex. 2006) 16

Logan v. Denny's Inc., 259 F.3d 558 (6th Cir. 2001) 18

McCoy v. City of Shreveport, 492 F.3d 551 (5th Cir. 2007) 15

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Cited Authorities

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Minter-Smith v. Mukasey, No. 3:03-CV-1057, 2008 WL 2164565 (S.D. Miss., May 22, 2008) 16, 17

Mungin v. Katten Muchin & Zavis, 116 F.3d 1549 (D.C. Cir. 1997) 20

Pennsylvania State Police v. Suders, 542 U.S. 129 (2004) 14, 15, 24

Petrosino v. Bell Atlantic, 385 F.3d 210 (2d Cir. 2004) 21, 22

Pratt v. City of Houston, 247 F.3d 601 (5th Cir. 2001) 24

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Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000) 24

Saroli v. Automation & Modular Components, Inc., 405 F.3d 446 (6th Cir. 2005) 18

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Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406 (9th Cir. 1996)	19
Smith v. Henderson, 376 F.3d 529 (6th Cir. 2004)	18
Terry v. Ashcroft, 336 F.3d 128 (2d Cir. 2003)	31, 32
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	30
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Veitch v. England, 471 F.3d 124 (D.C. Cir. 2006)	20
Wallace v. City of San Diego, 479 F.3d 616 (9th Cir. 2007)	19
Ward v. Bechtel Corp., 102 F.3d 199 (5th Cir. 1997)	15
Watson v. Nationwide Ins. Co., 823 F.2d 360 (9th Cir. 1987)	19
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Yearous v. Niobrabra County Mem'l Hosp., 128 F.3d 1351 (10th Cir. 1997)	20

Cited Authorities

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No. 08-599

IN THE
Supreme Court of the United States

LAUREN BROWNING,

Petitioner,

v.

SOUTHWEST RESEARCH INSTITUTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Respondent Southwest Research Institute (the "Institute") respectfully requests that the Court deny the Petition for Writ of Certiorari. Among reasons for denial are that (1) this case involves only correct application of settled law to particular factual circumstances; (2) the Petition is an inappropriate request for this Court to review facts, not law; and (3)

the unpublished, non-precedential decision below conflicts with no decision of any other court.[1]

This case stirred no controversy among the courts below. In a carefully detailed Memorandum and Recommendation, the Magistrate Judge recommended summary judgment for the Institute on all of Petitioner's ("Browning's") claims, which included claims for wage discrimination, failure-to-promote, retaliation and constructive discharge. Pet. App. 25a. The district court, reviewing *de novo*, adopted the Magistrate Judge's entire recommendation and granted summary judgment to the Institute on all claims. Pet. App. 21a. The Fifth Circuit, again reviewing the record *de novo*, affirmed summary judgment for the Institute on all claims in an unpublished, non-precedential decision. Pet. App. 1a. Among the three courts below, there is not a single finding that Petitioner has a triable claim; no tone of dissent has been struck. Yet, Petitioner now asks this Court to sift through the same evidence, and to play the role of the ultimate human resources manager by overriding routine workplace decisions with which she disagreed. This is a fact-intensive employment case that does not warrant certiorari. Sup. Ct. R. 10.

Trying to draw the Court into this case, Petitioner manufactures two purported "circuit splits." No such

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[1] Because the decision below is an unpublished, non-precedential disposition, it is not even precedent in the Fifth Circuit, which by itself renders this case unsuitable for certiorari. *See* Robert L. Stern *et al.*, *Supreme Court Practice* 459 (8th ed. 2002) (Court "does not ordinarily" grant certiorari to review unpublished dispositions).

splits exist. Like all circuits, the Fifth Circuit uses "relevant" or "aggravating factors" as guides to review evidence for constructive discharge. Employment law cases present factually dense and context-bound scenarios. Such guides assist the reviewing court in reaching the correct decision. The Fifth Circuit does not apply the factors on an "exclusive" basis or in a "checklist" fashion.

There is no support for Petitioner's view that the Fifth Circuit failed to apply the *Reeves* summary judgment standards, or applied them differently from other circuits. Nothing in the record indicates the Fifth Circuit weighed evidence, made credibility determinations or improperly discredited evidence—or needed to do so—to determine that no genuine issue of material fact exists on any of Petitioner's claims. This fact-bound case is not proper for certiorari.

COUNTERSTATEMENT

A. Factual Background.

Southwest Research Institute is a non-profit institution that conducts broad-based scientific and engineering research, development, analysis, and exploration across a multitude of disciplines. The Institute is organized into divisions, with each division handling a distinct area of research or analysis. Browning worked in Division 20, the Center for Nuclear Waste Regulatory Analyses, which, at the time of her employment, was devoted nearly 100% to projects

sponsored by the U.S. Nuclear Regulatory Commission. R7:1376.[2]

Browning was hired by the Institute on December 7, 1998. She was offered a limited-term, one-year contract position as a Research Scientist with Division 20 at a salary of $42,000, within the $35-48,000 salary range she indicated in her employment application as acceptable. R7:1392. Nonetheless, Browning rejected this offer and asked for more money. The Institute offered $45,000, and she accepted. R7:1458.

Institute personnel primarily responsible for Browning's interview, selection and hire were Dr. English Pearcy (her immediate supervisor for the entirety of her employment), Dr. Budhi Sagar (Technical Director for Division 20), and Dr. Wes Patrick (Vice President of Division 20). R7:1376.

Browning enjoyed beneficial personnel actions at the direction of Pearcy, Sagar and Patrick. In December 1999, one year after Patrick, Sagar and Pearcy selected her as a one-year term employee, they elected to rehire her by extending her limited term contract for another year. R7:1376. On October 6, 2000, with input and

[2] The Institute cites to the Record in the court below. Volume 7 of the Record contains Defendant Southwest Research Institute's Motion for Summary Judgment, and Volumes 9-12 contain Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment. The Record will be cited as R[v]:[page], *e.g.*, R7:1376. The Supplemental Record contains Southwest Research Institute's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment, cited as SR[page].

agreement from Pearcy and Sagar, Patrick recommended that the Institute hire Browning as a regular employee. R7:1457. Selection of Browning as a regular employee was, in effect, a third hiring decision by the same actors that Browning accuses of discrimination.

Browning's employment benefits included regular pay increases. In every year following her initial hire, Browning received, at the recommendation and/or approval of Pearcy, Sagar and Patrick, significant salary increases, averaging 5.5% per year up to the date she quit. R7:1458.

Browning received favorable performance appraisals of her technical work every year of her employment. While her evaluations declined from "Exceeds Expectations" to "Meets Expectations"[3] in January 2003, Browning's employment was never in jeopardy; she was never disciplined or reprimanded for conduct leading to suspension or separation from employment. R7:1432-33, 1465-75. When Browning quit, her performance ranking was Meets Expectation(-), the same ranking she had received the previous year in January 2003, ten months *before* her self-described November 2003 "Earliest Act of Discrimination." R7:1464. She never received a ranking of either "Needs Improvement" or "Unsatisfactory."

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[3] Division 20 evaluates employees based on performance categories: Clearly Outstanding, Exceeds Expectations, Meets Expectations, Needs Improvement and Unsatisfactory. An employee may receive a "+" or "–" to denote slight variations within the overall ranking. R7:1376, 1463.

The evaluations of Browning's work by Pearcy, Sagar and Patrick recognized her professional contributions, in a positive and encouraging manner, while providing counseling where necessary. R7:1465-75. Browning responded favorably to the evaluations. For example, she stated: "I have an excellent job;" "Management provides me information and support in a forthright and responsible fashion;" "[I] want to thank English Pearcy for providing to me much needed encouragement during more troubled times;" and "I appreciate the perspective and words of encouragement that English Pearcy provides me." *Id.*

Yet, as early as January 2001, just months after Browning accepted her Research Scientist position as a regular employee, she expressed dissatisfaction with her job title and requested promotion. In her 2001 self-evaluation in which Browning expressed great satisfaction with her job and spoke highly of Pearcy as her supervisor, she also asked for a promotion. R7:1482. In her January 2002 performance review, Browning again requested promotion despite her unequivocal knowledge of, and failure to satisfy, Division 20's requirement of two consecutive "Clearly Outstanding" reviews before consideration for advancement. R7:1396-1399, 1468, 1493-95, 1499, 1376. Instead, Browning asked the Institute to change the rules for *her* by waiving the standard applicable to her Division co-workers and afford her special treatment above the others. R:1396-97.[4]

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[4] Browning testified as follows: "*Q:* Are you aware of any other employee at the Institute who has had a different protocol than the two successive clearly outstanding rankings applied to them? *A: No. Q:* But you are asking for establishment of a protocol outside of that to be applicable to you. *A: Yes.*" R7:1396-97.

While Browning talked about wanting a larger salary, she never complained she was being paid unequally to males performing similar work. In early 2001, Browning met with Pearcy and showed him a national salary survey and graph she prepared comparing her salary with imaginary employees. R7:1398. In 2002, Browning stated "I feel that I am under compensated for the nature and extent of [my work] relative to my peers." R7:1439. Browning gave no indication of alleged gender bias. To the contrary, she identified three males and two females as her peer group in completing her self evaluation. R7:1491. In 2003, Browning, together with Michael Smith and Randall Fedors, male co-workers and co-members of the Division's management advisory committee ("DMAC"), met with the Institute's human resources department to obtain information for DMAC about how salaries were determined. R7:1399-1402. Browning made no complaint of unequal pay relative to her co-workers, male or female, at this meeting. R7:1404-08.

It is undisputed that Browning never received two consecutive "Clearly Outstanding" reviews, which are required for promotion consideration. Some male comparators had the required Clearly Outstanding reviews but were still not promoted. R7:1354; SR13. Further, the record contains undisputed examples of males who had remained in the position of Research Scientist long or longer than Browning without promotion. R7:1362; 1581, 1592, 1597. Conversely, under the same system, female co-workers received positions, salaries, promotions, and performance appraisals greater than Browning's. R7:1346, 1362-63; 1586. Notably absent is any allegation that Division 20's

requirements were not applicable to all Division 20 employees.

Browning ignores her several negative performance issues as the reason for her failure to achieve Clearly Outstanding evaluations. By selectively omitting any discussion of the "opportunities for improvement" in her performance appraisals, Browning would have this Court believe she was never counseled regarding a single area in which she could improve. ***Every*** performance appraisal she received from the first in August 1999 to the last in January 2004 contained a discussion of opportunities for improvement. R9:1948-91.

Notwithstanding her theatrical description of events—frequently unsupported by any record citations[5]—Browning was indeed reprimanded for engaging in the worst "over per diem" expenditures ever encountered by Division 20 Administration Director Pat Mackin.[6] Browning chose to submit her personal "estimate" of per diem costs and failed to disclose that her estimate was ***not*** in accord with Institute policy. SR97-101. In fact, in Browning's "see if I can slip it by approach" she exceeded the per diem by nearly double for each and every day of a six day trip. SR105.

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[5] *See, e.g.*, Pet. 4, 7-8.

[6] In deposition, Mackin explained that the significance of the problem was not that Browning had exceeded costs but the amount by which she had done so. "Q. Is it true that other people had exceeded costs significantly on other trips? A. ***I've never seen anyone near the amount that Dr. Browning exceeded costs.***" SR101.

Browning selectively states the facts when she accuses Pearcy, her supervisor, of keeping a secret paper trail that documented her performance issues. Bizarrely twisting good management practices, Browning contends that Pearcy's maintenance of notes on subordinates' job performance throughout the year (as opposed to attempting total recall of a year's worth of events at evaluation time) was deceitful, conspiratorial and an act of retaliation. Pet. 5a. Browning conveniently omits Pearcy's direct testimony regarding the equal, non-discriminatory application of record keeping practices to all his staff members.[7]

Browning's rotation from the position of Principal Investigator in January 2004 was not disciplinary. The undisputed testimony establishes that Pearcy went to his supervisor Sagar, discussed rotating Browning from the lead role because it was the normal practice, and obtained approval by Sagar to rotate her out of the position. SR82-84.

Patrick never threatened Browning's job. Browning herself stated only that "I ***feel*** that he then threatened me." R10:2069. There is no testimony that the discussion between Patrick and Browning (occurring one and a half years before Browning quit), involved allegations of gender based wage differences. Browning conveniently omits that Patrick had the same discussion with

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[7] Pearcy testified as follows: "*Q.* And what was the purpose of the file? *A.* ***I keep a file on each of my staff members.*** I keep the performance evaluations that – such as the ones you've showed in these exhibits, and I keep notes and emails that are relevant to their performance." R7:1383.

Browning's male colleague, Mike Smith, regarding the same DMAC meeting in which Smith and Browning participated. SR67-71.

In 2003, Division 20 decided to grow the department and add additional staff. A search commenced for a highly qualified, experienced individual as a Senior Research Scientist, one level above Browning's level. Browning participated in the search and was asked, along with other Division employees, to interview and evaluate applicants. The Institute asked for Browning's evaluation and input on candidates who may become her colleague, demonstrating non-discriminatory treatment and recognition of her value to the organization. Dr. Jude McMurry, a woman with over 12 years of specific nuclear waste analysis experience, was hired before Browning quit, despite Browning's demeaning and negative evaluation of her. Browning was the only interviewer who negatively evaluated the extremely qualified McMurry; stating that she (Browning) "wouldn't work with her," and that McMurry "dressed like a housewife." R9:1888; SR36.

On May 10, 2004, Browning quit, just four months after receiving a "Meets Expectations" evaluation, two months after receiving a 3.5% pay increase, and weeks after an encouraging meeting with Pearcy and prestigious service as the co-chair of the international Materials Research Society 2004 spring meeting. R7:1330; 1458, 1473. Browning's one-line resignation letter provided no reason for quitting, asserted no discriminatory treatment, and complained of no poor (let alone intolerable) working conditions. R7:1498.

B. Decisions Below

Browning brought claims in the Western District of Texas for failure-to-promote and constructive discharge under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.* and wage discrimination and retaliation under Title VII and the Equal Pay Act ("EPA"), 29 U.S.C. §§ 206(d), 215(a)(3).

The District Court referred the case to the Magistrate Judge who, in a detailed Memorandum and Recommendation, recommended summary judgment on all claims. Pet. App. 25a. Browning objected to the recommendation, triggering the District Court's *de novo* review of all issues for which proper objections were made. Pet. App. 23a. Finding Browning's objections "without merit," the District Court fully adopted the Memorandum and Recommendation, granted the Institute's motion for summary judgment, and dismissed the case with prejudice. Pet. App. 19a, 24a. Browning appealed to the Fifth Circuit, which affirmed the entire judgment unanimously in an unpublished opinion. Pet. App. 1a.

With respect to Browning's Title VII and EPA wage discrimination claims, the Fifth Circuit assumed "for the sake of argument" that Browning established a *prima facie* case of wage discrimination. Conducting a "careful review" of the record, the Fifth Circuit found that Browning waived any argument based on comparisons to other Research Scientists (Browning's level) and Senior Research Scientists (one step above Browning's level). Pet. App. 6a. The panel also found that the Institute's evidence showed that Browning's "salary

reflected her prior work experience, seniority, job title, field of study, and contributions to the work of the Institute." Pet. App. 5a-6a. Consequently, Browning failed to create a genuine issue of material fact as to whether the Institute's reasons were pretextual, and the court affirmed the summary judgment on the wage discrimination claims. Pet. App. 7a-8a.

The panel found that Browning established a *prima facie* case for failure-to-promote, as the subjectivity of the evaluation criteria could be pretext for discrimination. Pet. App. 10a. However, the Institute produced a host of legitimate, non-discriminatory reasons for Browning's lack of promotion, including: she made gratuitous, negative comments about her colleagues; discussed internal Institute procedures with clients; failed to follow Institute procedures; made an unauthorized business trip; failed to accurately report her time; and was reluctant to participate in certain Institute initiatives. Pet. App. 11a. Browning was unable to produce any evidence of pretext, and the court held that "[b]ased on the evidence offered by Browning, no trier of fact reasonably can infer that the Institute is dissembling to cover up a discriminatory purpose." Pet. App. 12a. The court thus found Browning failed to meet her burden on her failure-to-promote claim, and affirmed the summary judgment. Pet. App. 13a.

By contrast, the Fifth Circuit found that Browning failed even to establish a *prima facie* case on her retaliation claim. Emphasizing that "context matters," *cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), the court concluded that Browning failed to create a genuine issue of material fact as to whether

she experienced a materially adverse employment action. Pet. App. 13a, 17a.

Specifically, Browning's rotation out of the position of Principal Investigator, in light of the "particular circumstances" and "real social impact of workplace behavior," would not dissuade a reasonable worker from making or supporting a charge of discrimination. Pet. 14a-15a. In context, Browning's allegations that she was badgered, harassed and humiliated in a meeting with her supervisor provided "no indication that this conversation was anything other than an attempt to discuss Browning's concerns about her pay." Pet. App. 15a. Browning's allegations of verbal abuse or threats "amounts at best to nothing more than 'petty slights' or 'minor annoyances' that all employees face from time to time." Pet. App. 16a (quoting *Burlington*, 548 U.S. at 68). Browning's allegations that the Institute tried to hire another employee to replace her, suppressed her performance evaluations and subjected her to extra scrutiny were held to be conclusory. Pet. App. 16a-17a. Accordingly, the panel affirmed the summary judgment on retaliation because Browning did not create a genuine issue of material fact as to her Title VII and EPA retaliation claims. Pet. App. 17a.

Likewise, the court found that Browning also failed to establish a *prima facie* case that she was constructively discharged. Looking to factors from other cases as a guide, the court found no evidence of salary decreases or demotion, no reassignment to menial work or a younger supervisor, no offer of early retirement or less favorable employment terms. Pet. App. 18a. Noting that Browning alleged she was constructively discharged

as a result of retaliatory treatment, the panel drew on its earlier analysis of retaliation to hold that "Browning's working conditions were not so intolerable that a reasonable person in her situation would have felt compelled to resign." Pet. App. 18a. The Fifth Circuit therefore affirmed the summary judgment for the Institute on Browning's constructive discharge claim.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT'S NON-PRECEDENTIAL DECISION CORRECTLY APPLIED SETTLED LAW TO SPECIFIC FACTS AND DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT.

Petitioner contends that the Fifth Circuit uses a "rigid check list" of aggravating factors to determine whether employment actions rise to the level of constructive discharge, and asserts that if evidence does not fit the supposed checklist, it "vanishes." Pet. 10. Petitioner further contends that the Third, Fifth and Sixth Circuits use a "judicially created" approach to reviewing constructive discharge evidence, whereas the Second, Ninth, Tenth and D.C. Circuits purportedly do not. Neither this "checklist" approach nor this so-called circuit split exist.

A. The Fifth Circuit applies "aggravating factors" non-exclusively, as part of a review of all of the evidence.

In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 (2004), this Court described constructive discharge as "an aggravated case" of sexual harassment

or hostile work environment. The Court added that "[a] hostile-environment constructive discharge claim entails something more: [a] plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Id.* at 147.

Faithful to *Suders*, the Fifth Circuit reviews constructive discharge evidence by examining an employee's "working conditions" for "something more," using "aggravating factors" as a guide. *See, e.g., Aryain v. Wal-Mart Stores*, 534 F.3d 473, 480 (5th Cir. 2008); *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007); *Brown v. Kinney Shoe Co.*, 237 F.3d 556, 566 (5th Cir. 2001); *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir. 2000). The factors are sometimes referred to as *Barrow* factors. *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 297 (5th Cir.1994).[8]

The *Barrow* factors are used in a non-exclusive manner, not as a "checklist." *See Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir.1997) ("[t]he list of factors in *Barrow* is non-exclusive"). In fact, *Barrow* itself held that the "list is not exclusive." *Barrow*, 10 F.3d at 297. In that case, the plaintiff had asserted a *non-*

[8] *Barrow* identified the aggravating factors as (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement on terms that would make the employee worse off whether the offer was accepted or not. *Barrow*, 10 F.3d at 297 (listing precedent for various factors).

enumerated basis for his alleged constructive discharge—that a reasonable employee would feel compelled to resign after being unable to obtain regular work on a gang. *Id.* The Fifth Circuit considered the evidence for that additional factor, but concluded that it did not establish a *prima facie* case for constructive discharge. *Id.* at 297-98. Thus, *Barrow* did precisely what Browning contends a court is supposed to do in reviewing a claim of constructive discharge: consider the evidence as a whole, and look beyond any "checklist" of factors.

Recent cases show the lower courts within the Fifth Circuit clearly understand that the *Barrow* factors must be applied non-exclusively. *See McGarry v. Univ. of Mississippi Med. Center*, No. 3:05-cv-792, 2008 WL 3822447, *8 (S.D. Miss., Aug. 12, 2008) ("In determining whether this standard has been met, courts have considered the following, non-exclusive list of events [listing *Barrow* factors]"); *Lindsey v. One Source*, No. C-05-571, 2006 WL 3360285, *4 (S.D. Tex. 2006) ("Whether a reasonable employee would feel compelled to resign depends on the facts of each case, but the Fifth Circuit considers the following non-exclusive factors to be relevant in the analysis [citing *Barrow* factors]").

Another recent case, *Minter-Smith v. Mukasey*, No. 3:03-CV-1057, 2008 WL 2164565, *5 (S.D. Miss., May 22, 2008), exemplifies how non-enumerated factors are considered. The district court noted plaintiff's evidence that no other unit manager had previously been given the onerous burden of supervising more than one unit. *Id.* The court remarked that though the evidence "fails to invoke the most frequently cited factors for

constructive discharge, those factors are not exclusive." *Id.* at *7 (citing *Barrow*, 10 F.3d at 297). "Considering the evidence as a whole," the court found that evidence of "more onerous duties," though not one of the *Barrow* factors, was sufficient to support a jury's verdict on constructive discharge. *Id.* at *6-8. Thus, there is no doubt that courts within the Fifth Circuit understand that they are not bound to use an exclusive checklist, and will affirm constructive discharge based on "relevant" or "aggravating" factors outside the *Barrow* factors.

B. There is no split in the circuits as to the use of "relevant" or "aggravating" factors.

Petitioner claims that the Third, Fifth and Sixth circuits use a "judicially created approach" to reviewing constructive discharge evidence that is at odds with the Second, Ninth, Tenth and D.C. circuits. This supposed "circuit split" does not exist. All circuits review constructive discharge evidence in essentially the same manner.

The Third Circuit uses what it sometimes calls *Clowes* factors in constructive discharge cases. *Cf. Clowes v. Allegheny Valley Hosp.*, 991 F.2d 1159, *cert. denied*, 114 S. Ct. 441 (1993). However, even in the case cited by Petitioner, the Third Circuit noted that "we have never made the *Clowes* factors an absolute requirement for recovery." *Duffy v. Paper Magic Group, Inc.*, 265 F.3d 163, 167-68 (3d Cir. 2001) (noting that list is not exhaustive, and absence of factors is "not necessarily dispositive"). The Third Circuit uses the factors as a guide. *See Konstantopoulos v. Westvaco Corp.*, 112 F.3d

710, 719 n.2 (3d Cir. 1997) (approving of the district court's use of factors as a part of its analysis, and noting "the court merely used these factors ***as an illustrative guide*** in exactly the same manner as this court used those factors in *Clowes*, determining that an absence of strong evidence for any of the factors supported a finding that the plaintiff was not constructively discharged").

The Sixth Circuit has expressly adopted the Fifth Circuit's use of factors to guide analysis of all of the evidence, and has confirmed that the factors are not used as a "checklist." *See Saroli v. Automation & Modular Components, Inc.*, 405 F.3d 446, 451 (6th Cir. 2005) (citing *Brown*, 237 F.3d at 570) ("It is important to note that while the Fifth Circuit's approach aids in our constructive-discharge determination, its list of factors is not exclusive."); *see also Logan v. Denny's Inc.*, 259 F.3d 558, 570-71 (6th Cir. 2001) ("This [constructive discharge] inquiry involves consideration of the non-exclusive list of factors noted above"). A constructive discharge claim "depends on the facts of each case." *Smith v. Henderson*, 376 F.3d 529, 533 (6th Cir. 2004).

The Second Circuit is in step with the Third, Fifth and Sixth circuits by considering the factors found in its own precedent as the measure for what constitutes constructive discharge. For example, in one case, the court reviewed several of its constructive discharge cases and concluded that "as ineffective or even incompetent as [defendant's] handling of the matter may have been, it does not rise to the level of deliberate action required by our precedent." *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000); *see also Schiano v. Quality Payroll Systems, Inc.*, 445 F.3d 597,

608 n.9 (2d Cir. 2006). By reviewing whether a plaintiff's evidence rises to the level of evidence action required by precedent for a constructive discharge to exist, the Second Circuit performs the same function as if it had begun from a list of factors culled from that precedent. In either case, the court compares the evidence in a context-specific manner to factors that constituted constructive discharge in other cases.

The Ninth Circuit also employs a non-exclusive list of aggravating factors. *See Wallace v. City of San Diego*, 479 F.3d 616, 626 (9th Cir. 2007) (quoting *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1412 (9th Cir. 1996) (To establish that he was constructively discharged, "a plaintiff must at least show some aggravating factors, such as a continuous pattern of discriminatory treatment")); *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989) (same); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) (same). The factors employed by the Ninth Circuit are derived from the same source as in other circuits: precedent from its constructive discharge cases. *See, e.g., Huskey v. City of San Jose*, 204 F.3d 893 (9th Cir. 2000) ("Our precedent, however, supports our conclusion that Huskey's allegations were insufficient as a matter of law to sustain a finding by a reasonable fact finder that his 'working conditions were so intolerable and discriminatory that a reasonable person would feel forced to resign.'") (citation omitted). The Ninth Circuit undertakes the same review as the other circuits in considering the factors that may lead to constructive discharge. *See, e.g., Schrindig*, 80 F.3d at 1412 ("Schnidrig was not demoted, did not receive a cut in pay, was not encouraged to resign or retire, and was

not disciplined . . . his working conditions were not so intolerable and discriminatory that a reasonable person would feel forced to resign.")

It is no different in the Tenth Circuit, which noted in a recent constructive discharge decision that "several cases show the type of evidence plaintiffs must produce to meet their burden" to prove constructive discharge. *Fisher v. Forestwood Co.*, 525 F.3d 972, 981 (10th Cir. 2008). In other cases, the Tenth Circuit lists the factors it uses as a guide. *See Yearous v. Niobrabra County Mem'l Hosp.*, 128 F.3d 1351, 1356 (10th Cir. 1997) (listing items as "among the factors we consider in determining the voluntariness of an employee's resignation").

The D.C. Circuit has stated that "the mere existence of workplace discrimination is insufficient to make out a constructive discharge claim," and that constructive discharge "requires a finding of discrimination and the existence of certain 'aggravating factors.'" *Veitch v. England*, 471 F.3d 124, 130-31 (D.C. Cir. 2006); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997); *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981). Like the other circuits, the aggravating factors are culled from the court's precedent. For example, in *Veitch*, 471 F.3d at 131, the court discussed factors accepted and rejected in other cases, and held that, "[a]ccepting [the plaintiff's] assertions as true, we conclude that, as a matter of law, they do not constitute 'aggravating factors' under our Title VII precedents."

In sum, there is no real difference—and certainly no "split"—between the Third, Fifth and Sixth circuits, on one hand, and the Second, Ninth, Tenth and D.C.

circuits, on the other, in how they review constructive discharge evidence. In determining whether conditions were so intolerable that a reasonable person in the employee's position would have felt compelled to resign, all circuits review all of the evidence of the workplace environment guided by comparisons with "aggravating factors" in other constructive discharge cases.

If Browning's case had been heard in one of the circuits she claims to properly review constructive discharge, her claims still would not have survived summary judgment. Her fundamental argument is that she resigned because she found herself "hitting the glass ceiling" and therefore felt compelled to resign. Pet. 28. An instructive comparison is with *Petrosino v. Bell Atlantic*, 385 F.3d 210, 238 (2d Cir. 2004), where the Second Circuit found that evidence of a "glass ceiling" failed to support constructive discharge, *despite* an underlying finding that there was a sexually hostile work environment. The Second Circuit found that Petrosino experienced a work environment that employees and supervisors made deliberately hostile to women. Nonetheless, the court held that "it is doubtful that a constructive discharge claim can be established by an employee dissatisfied with reduced promotion opportunities." *Id.* at 231.[9] "An employee who anticipates little chance of promotion in a particular job may well decide to seek employment elsewhere, but the employee can hardly demonstrate that the job she in fact holds

[9] The Second Circuit also expressly found that the plaintiff's complaint that her supervisory responsibilities were reduced and transferred to a successor did not support her constructive discharge claim. *Id.*

was rendered so intolerable that she was compelled to quit." *Id.*

By contrast, Browning obtained no underlying finding that the Institute discriminated or created an environment hostile to women and her claims for equal pay, failure to promote and retaliation did not survive summary judgment. Given that the Second Circuit in *Petrosino* found no evidence to support constructive discharge based on an alleged "glass ceiling" and reduction in responsibility despite an underlying finding of a intentionally hostile environment towards women, Browning's constructive discharge claim would have failed in the Second Circuit as well.

The non-exclusive use of aggravating factors is entirely consistent with this Court's statement in *Burlington*, 548 U.S. 53, 69 (2006) that "context matters" in discrimination cases. The Court's materially adverse standard for retaliation was intended to "separate significant from trivial harms." *Id.* at 68. The admonition on the importance of context was part of the Court's discussion of a need for an objective standard that is "judicially administrable." *Id.* The Fifth Circuit's and the other circuits' use of non-exclusive aggravating factors embraces *Burlington*'s direction regarding context while making use of precedent in other constructive discharge cases to foster a judicially administrable approach to reviewing evidence of constructive discharge. Nothing in that approach remotely warrants certiorari.

II. THE DECISION BELOW CORRECTLY APPLIED THE *REEVES* SUMMARY JUDGMENT STANDARDS TO A DENSE SET OF FACTS AND PETITIONER SEEKS AN UNFIT USE OF THE COURT'S SUPERVISORY POWER.

Browning urges the Court to exercise its supervisory power to correct what she calls a "non-application" of the Court's summary judgment standards in *Reeves*. This issue—which ultimately amounts to no more than request for the Court to dig through the facts once more—is an unfit reason for granting certiorari. Sup. Ct. R. 10.[10]

A. This case does not implicate the fundamental issue in *Reeves*.

Browning asserts that the Fifth Circuit does not apply *Reeves* in non-outright termination cases. This assertion is flatly incorrect, and an attempt to dodge the fact that Browning's evidence was so weak that it does not even implicate this Court's fundamental concern in *Reeves*.

In *Reeves*, the Court held that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148. The lower court "erred in proceeding from the premise that a plaintiff

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[10] Petitioner addresses only the application of *Reeves* to her constructive discharge, retaliation and non-promotion claims. Petitioner has not properly put her wage discrimination claims before the Court. Sup. Ct. R. 14.

must always introduce additional, independent evidence of discrimination" to survive summary judgment. *Id.* at 149. An employer's motion for summary judgment may be denied on the basis of a plaintiff's *prima facie* case and evidence that the employer's legitimate, non-discriminatory reasons for its actions are pretextual. *Id.* at 148-49.

Faithful to *Reeves*, the Fifth Circuit has unequivocally rejected the use of the "pretext plus" standard. *See Ratliff v. City of Gainesville*, 256 F.3d 355, 362 (5th Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 n.4 (5th Cir. 2000). The Fifth Circuit reverses summary judgment for employers when the plaintiff has made a *prima facie* case and produced evidence of pretext. *See, e.g., Blow v. City of San Antonio*, 236 F.3d 293, 298 (5th Cir. 2001); *Pratt v. City of Houston*, 247 F.3d 601, 606-07 (5th Cir. 2001).

Due to the weakness of Browning's evidence, however, this case does not even implicate *Reeves*' "pretext plus" prohibition. Browning failed to establish a *prima facie* case for constructive discharge and retaliation, and failed to show pretext on her non-promotion claim. Pet. App. 13a, 17a-18a.[11] The issue of

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[11] At one point, Browning confuses the *Reeves* "pretext plus" issue with the Court's doctrine on constructive discharge. The Fifth Circuit does *not* hold that no amount of harassment can constitute constructive discharge. Pet. 24. The statement that "mere harassment" does not constitute constructive discharge follows *Suders*' instruction that constructive discharge requires "something more." *Suders*, 542 U.S. at 147. Notably, Petitioner cites no authority in support of her lengthy statement of the Fifth Circuit's supposed holding. *See* Pet. 24.

whether the court below required "additional evidence" never even arose.

B. The panel correctly applied *Reeves* to Petitioner's retaliation and constructive discharge claims.

Beyond the "pretext plus" issues, Browning's assertion that the Fifth Circuit did not apply *Reeves* rests on distortions of the record and decision below, and a heavy dose of second guessing about whether the Fifth Circuit reviewed the whole record in context, weighed evidence, made credibility determinations, or improperly drew inferences or credited or discredited evidence. *See Reeves*, 530 U.S. at 150-51.

Browning failed even to create a fact issue on her *prima facie* cases for retaliation and constructive discharge. Pet. App. 17a-18a. In the court's careful and thorough discussion of retaliation, the Fifth Circuit went out of its way to emphasize the importance of considering the evidence as a whole and the facts in their context. *See* Pet. App. 13a-17a. The decision expressly cites and heeds the Court's holding in *Burlington*, 548 U.S. at 68, that "context matters" and surrounding circumstances of acts should be considered. *See* Pet. App. 14a.

The panel did not "discount" Browning's evidence regarding her rotation out of the role of Principal Investigator. Pet. App. 14a. Rather, the panel had well-established reasons for finding that the evidence did not enable her to survive summary judgment. Browning admitted that the rotations occurred normally. Pet. App. 14a. Therefore, the court credited this fact for the

Institute as uncontroverted. *Reeves*, 530 U.S. at 151. *Reeves* does not require the court to infer that Browning was rotated out of the Principal Investigator position as a result of retaliation when, as here, the inference is unreasonable and unjustified. *Id.* at 150 (drawing all "reasonable" inferences in nonmoving party's favor); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("all justifiable inferences are to be drawn in [the non-movants'] favor"); *TIG Ins. Co. v. Sedgwick James of Wash*, 276 F.3d 754, 759 (5th Cir. 2002) ("Unsubstantiated assertions, improbable inferences and unsupported speculation are not competent summary judgment evidence."). Further, the rotation had no specific association with protected activity. Pet. App. 15a; *Anderson*, 477 U.S. at 248 (disputed fact issues that are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion).

The Fifth Circuit found that the badgering, harassing or humiliating conversations alleged by Browning occurred in the context of her request for a significant pay increase, and that her supervisors even offered her a "carrot" to overcome performance violations that would have permitted firing her for cause. Pet. App. 15a. In context, the evidence showed the discussions were simply attempts to discuss Browning's concerns about her pay and did not show retaliation. *Id.* Browning contends that allegations that her supervisor called her "crazy," suggested that she avail herself of the Institute's psychiatric services, and told her that if she did not like that the Institute was doing, "there's the door" were weighed against her. Pet. 26-27. She believes the panel discredited or discounted

evidence of an encounter in which an Institute administrator allegedly confronted Browning in a physically threatening manner over her violation of travel policies. Pet. 27. The court, however, found that in all of these exchanges "context mattered." Pet. App. 16; *Burlington*, 548 U.S. at 68. The evidence was not weighed or discounted; it was too weak to create a triable issue. *Reeves*, 530 U.S. at 148-49. The "heated exchange of words in a work place confrontation presents no set of facts that constitute retaliation" and amounted to nothing more than "petty slights" or "minor annoyances." Pet. App. 16a; *Burlington*, 548 U.S. at 68. Nothing in these holdings contradicts *Reeves* or calls for an extraordinary exercise of this Court's supervisory power to consider the application of settled law to a dense set of facts.

Browning contends that the Fifth Circuit ignored evidence of rating suppression; that Browning was required to get pre-authorization to attend conferences; that her travel requests were subject to an "extra layer of scrutiny" to which male employees were not subject; that the Institute retaliated against her by attempting to hire an employee to take her position, by forcing her to interview and evaluate job applicants as a part of the process, and by suppressing her performance evaluations. Pet. 27. Petitioner also contends that the court discounted evidence that the Center's hiring policy prevented the hiring of a new employee unless there was a vacancy to fill, and that the newly hired geochemist McMurry was allegedly hired to perform the same work Browning had performed from 1998. Pet. 28. The court, however, found that all these allegations were conclusory. Pet. App. 16a-17a. As a result, these allegations were

not competent summary judgment evidence and the court was not involved in weighing or discounting evidence, determining credibility, or drawing inferences from evidence. FED. R. EVID. 56(e); *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("conclusory allegations unsupported by specifics [are] subject to summary dismissal"); *Anderson*, 477 U.S. at 349; *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996) ("Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment.").

In sum, the panel correctly applied *Reeves* to Browning's retaliation claim. The *evidence* as a whole—as opposed to conclusory allegations that the panel was not required to credit, or unreasonable inferences it was not entitled to draw—failed to establish a *prima facie* case and created no genuine issue of material fact as to retaliation.

With respect to constructive discharge, the Fifth Circuit certainly did more than apply a checklist. Pet. 19. The panel incorporated its earlier analysis of the facts, including the analysis of retaliation, as a part of its review of all the evidence for constructive discharge. Pet. App. 18a. The Petition shows that the panel was on target giving attention to retaliation, as Browning herself continues to focus her case for constructive discharge on the Institute's alleged retaliation. Pet. 28 (asserting that the "[t]he evidence, taken as a whole, shows a cumulative pattern of adverse conduct by the Institute toward Browning after she voiced a wage discrimination complaint"). The panel

thoroughly reviewed the evidence as a whole, including the "pattern" alleged by Browning, and properly applied *Reeves* to conclude that Browning established no *prima facie* case of constructive discharge. The panel properly affirmed summary judgment in favor of the Institute.

C. The panel correctly applied *Reeves* to Petitioner's failure-to-promote claim.

The Fifth Circuit found that Browning presented evidence sufficient to establish a *prima facie* case of failure-to-promote. Pet. App. 10a. Browning's *prima facie* case, however, quickly dissolved in the face of the Institute's legitimate, non-discriminatory reasons not to promote Browning, including her gratuitous, negative comments about her colleagues; discussions of internal Institute matters with clients; failures to follow Institute procedures; unauthorized business trips; failures to report time; and reluctance to participate in certain Institute initiatives. Pet. App. 11a.

Once the burden shifted back to Browning, she was unable to produce evidence to show that the Institute's reasons were pretextual. Her allegations that her ratings were subjective may have been evidence to support a *prima facie* case, but not pretext. Pet. App. 11a. Petitioner makes the frequent mistake of claiming evidence was weighed or credibility determined where there was no evidence at all. For example, Petitioner contends that the panel discounted evidence that the Institute gave Browning artificially low performance ratings and that the low ratings were based on unfounded allegations by Pearcy. Pet. 25. It is more accurate, however, to state that the panel did not weigh

any evidence because the allegations that her ratings were suppressed due to Pearcy's alleged lies were conclusory. Pet. App. 12a. Conclusory allegations are not competent summary judgment evidence. FED. R. EVID. 56(e); *Blackledge*, 431 U.S. at 74; *Anderson*, 477 U.S. at 349; *Eason*, 73 F.3d at 1325.

Petitioner argues the panel ignored evidence that the Institute judged Browning's performance more strictly than male employees, and that a male scientist was promoted to the next highest level in the career ladder, while Browning was not. Pet. 25. The panel did not "ignore" the evidence, but found the evidence showed "exactly the contrary." Pet. App. 12a. This uncontradicted evidence must be credited in the Institute's favor. *Reeves*, 530 U.S. at 150.

Petitioner argues that the panel required evidence that the Institute's conduct was openly gender-motivated. Pet. 25. This is a mischaracterization of the panel's opinion, which did not "require" evidence of openly gender-motivated conduct, but rather noted the absence of evidence of discriminatory intent. Pet. App. 12a. As *Reeves* reiterates, "the ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination." *Reeves*, 530 U.S. at 153; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("Although intermediate evidentiary burdens shift back and forth under [*McDonnell Douglas*], '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'").

The Fifth Circuit correctly applied *Reeves* in the case below. This issue does not merit certiorari.

III. THERE IS NOTHING IN THE APPLICATION OF *REEVES* STANDARDS IN THE DECISION BELOW THAT SEPARATES THE FIFTH CIRCUIT FROM ANY OTHER CIRCUIT.

Browning urges that the so-called "non-application" of *Reeves* in the case below makes the Fifth Circuit an outlier among the circuits and creates a "circuit split." As discussed in the previous section, the Fifth Circuit applies *Reeves* in constructive discharge, non-promotion and retaliation cases and does not depart from this Court's precedent in doing so.

Browning identifies two cases that she claims illustrate a correct application of *Reeves* standards, and implies that if the Fifth Circuit had similarly applied *Reeves*, her case would have been decided differently. Pet. 32. However, these cases do not demonstrate that the Second or Seventh Circuits, respectively, apply *Reeves* differently from the Fifth Circuit. The only difference is the plaintiffs had much better cases.

The plaintiff's evidence in *Terry v. Ashcroft*, 336 F.3d 128 (2d Cir. 2003) was far stronger than Browning's. Terry, a white male, produced detailed evidence regarding a number of vacancies for which he was passed over on the basis of race, but the employer failed to present any evidence of a non-discriminatory motive on his non-promotion claims. *Id.* at 138-140, 142. The evidence in *Terry* included hefty testimony that retaliation was commonplace in the defendant INS's

New York District Office. *Id.* at 141. Terry produced explicit, taped conversations of the defendants acknowledging that they denied him opportunities because of his complaints. *Id.* at 143. Terry showed pretext in his suspension from vehicle use because, among other reasons, his suspension came one day after a verbal altercation between Terry and a supervisor where the supervisor said, "we'll take care of you tomorrow." *Id.* at 145.

Browning's claim is thus miles apart from Terry's in the strength of her evidence. The Institute presented extensive evidence of legitimate non-discriminatory reasons for Browning's inability to obtain a promotion. Browning was unable to produce any evidence to show them to be pretextual. Pet. App. 11a. There is no evidence of any kind of discrimination at the Institute of the kind at Terry's INS office, and no reason to believe the Fifth Circuit would have reached a different outcome on these facts. The Second Circuit's proper decision to reverse a summary judgment ruling had nothing to do with the manner in which it applied *Reeves*.

Similarly, Browning's evidence bears no comparison to the strength of the plaintiff's proof in *Boumehdi v. Plastag Holding, LLC*, 489 F.3d 781 (7th Cir. 2007). Boumehdi assisted her supervisor in working a machine at a plastics printing press. Her supervisor said on numerous occasions that "women don't belong in the pressroom" and made crude sex-related comments. *Id.* at 786. When her supervisor saw her leaving the office of the Human Resources director, he said, "you're complaining about me, aren't you?" and warned her that if "[she] didn't watch it, [she'd] be scrubbing the floors

and doing the toilets." *Id.* Boumehdi's supervisor engaged in conduct categorically different from anything Browning alleges of Pearcy or other Institute personnel. Indeed, the demeaning gender-based comment in this case came from Browning herself—who belittled an applicant for "dress[ing] like a housewife," R9:1888, SR36—not from her supervisors. The outcome of this case would have been no different in the Seventh Circuit.

Browning cannot conjure up a circuit split by pointing to reversals in other circuits where the plaintiffs had significantly stronger evidence. These cases do not show any difference in the application of *Reeves*. This fact-bound issue does not warrant certiorari.

IV. PETITIONER WAIVED CORE ARGUMENTS IN THE COURT BELOW.

Browning's claims for wage discrimination under Title VII and the Equal Pay Act were at the heart of her case. The court below correctly found after "a careful review of the record" that Browning waived any argument regarding wage comparisons to numerous male employees at the Institute. Pet. App. 6a & n.4. Browning therefore failed to create a fact issue as to whether the Institute's reasons for disparate wage payments was pretextual. Pet. App. 7a. Due to this waiver, Petitioner cannot raise her wage discrimination claims before this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 08-599

IN THE

Supreme Court of the United States

LAUREN BROWNING,
Petitioner,

v.

SOUTHWEST RESEARCH INSTITUTE,
Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I. THIS CASE IS SUITABLE FOR CERTIORARI

Respondent asserts that "[b]ecause the decision below is an unpublished, non-precedential disposition, it is not even precedent in the Fifth Circuit, which itself renders this case unsuitable for certiorari" (Opp., p. 2, fn 1). For this proposition, Respondent cites Robert L. Stern, et al., *Supreme Court Practice* 459 (8th Ed. 2002). The 2002 Stern treatise states:

> The Court occasionally grants certiorari to review unpublished opinions, but it does not

> ordinarily do so and the fact that an opinion is unpublished is relevant to the Court's consideration of the need for review.

The 2007 Stern treatise addresses this subject under the heading of "Importance of Issues Involved." Robert L. Stern, et al., *Supreme Court Practice* 262-63 (9th Ed. 2007). The current Stern treatise notes the respondent can argue a case is uncertworthy because the opinion below is unpublished and under circuit rules lacks precedential value but then states the Court does grant certiorari to review unpublished decisions (*id.* at 506), adding:

> With the increased use of unpublished and summary decisions in federal and state intermediate appellate courts, one might think that the Supreme Court would presume such decisions to be unimportant. To the contrary, however, the Court grants certiorari to review unpublished and summary decisions with some frequency. (citations omitted). Indeed, Justice Stevens has indicated that he "tends to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify."

The Fifth Circuit's unpublished decision in *Browning* warrants review because:

1. The decision relates to important federal statutory issues, namely, federal laws prohibiting sex discrimination in employment, by way of promotion discrimination, retaliation, and constructive discharge.[1]

---

[1] Many times the Supreme Court reviews cases on certiorari where they involve the construction and application of acts of

2. The petition addresses important federal procedural issues that implicate the Court's supervisory power, specifically, whether district courts and courts of appeals may, contrary to *Reeves*[2] and *Burlington*,[3] use guidelines or checklists that exclude from consideration evidence favorable to the non-movant employee.[4] The six or seven factor checklist is not in any of the federal statutes. The checklists are pre-*Reeves* and pre-*Burlington*. A claimant with factors "on the list" has a better chance of getting her trial than one who does not (even if the list is non-exclusive). *Burlington* held that context matters in determining whether an assignment is materially adverse. In *Browning*, denials of promotion (a better assignment) is not on the checklist and does not count. Per *Browning* (and other published and unpublished Fifth Circuit decisions) hitting the glass ceiling cannot, as a matter of law, establish constructive discharge. This is a judicial presumption, contrary to *Reeves*, *Burlington* and the underlying statutes. The Fifth Circuit presumes conclusively that women, minorities, and older people would be unreasonable if they felt compelled to resign when shown that their careers were at a dead end. This issue may not seem important to Respondent, but it

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Congress, both where there is a conflict in circuits and in cases where the importance of the issues is the major basis for securing review. *Id.* at 267.

[2] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

[3] *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

[4] The Court sometimes grants certiorari in cases involving federal practice and procedure by reason of the importance of such matters. *Id.* at 273.

is vital to the people for whom these federal laws were written.

3. The case below, though unpublished, represents a trend in the Fifth Circuit in constructive termination cases, where the Court of Appeals drops the "non-exclusive" qualifier from the check list factors and weighs evidence contrary to *Reeves*; and

4. There is a growing split in the circuits on the use of an exclusive list of aggravating factors to make summary judgment rulings in constructive discharge cases.

II. THE BRIEF IN OPPOSITION STATES THE FACTS FAVORABLY TO RESPONDENT

Under *Reeves*, courts in summary judgment analysis must draw all reasonable inferences in favor of the non-moving party and may not make credibility determinations or weigh the evidence; they must give credence to the evidence favoring the non-movant, and give credit only to uncontradicted and unimpeached evidence from the moving party where that evidence comes from disinterested witnesses. *Reeves*, 530 U.S. at 150-51 (2000). Respondent's counterstatement of facts states the summary judgment evidence favorably to the moving party, Respondent. For example:

1. Respondent states as a fact that Browning's employment was never in jeopardy. (Opp. 5). This is contrary to Petitioner's evidence that in January 2001, her boss told her she was "crazy" if she thought she was being underpaid because of her gender (Pet. App. 51a). In February, 2002, Browning's boss indicated he would be happy if she quit by pointing to the door and replying, "If you don't think what we

[management] are doing is fair, then there is the door." (Pet. App. 58a). After Browning renewed her unequal pay and rank concerns in January 2003, Browning's boss told her that he had grounds to "terminate [her] employment for cause" and that "Texas is a right to work state." (Pet. App. 56a).

2. Respondent's statement of facts asserts that evaluations of Browning's work "recognized her professional contributions in a positive and encouraging manner, while providing counseling where necessary." (Opp. 6). Respondent leaves out harsh criticisms and badgering statements to Browning that occurred after she began complaining of wage disparity based on gender.

3. Respondent asserts Browning "never complained she was being paid unequally to males performing similar work." (Opp. 7). This "fact" discredits or disbelieves Browning's evidence that in January 2001, as they discussed her annual performance review, Browning showed Pearcy an American Chemistry Salary Survey, pointed out a section stating that female scientists in her field earn less than their male counterparts, then asked Pearcy, "Is this what's happening to me?" (Pet. App. 51a).

4. Respondent asserts Patrick never threatened Browning's job. (Opp. 9). This statement of "fact" views the evidence favorably to Respondent and discredits Browning's testimony that, after reviewing the note on the back of her performance evaluation about Brownings' concerns of being paid less than her male peers warranting scrutiny, Patrick in February 2003 confronted her about what she had written in an intimidating manner and threatened her job by saying he could fire her right then and there for

cause, and reminding her that Texas was a right to work state. (Pet. App. 56a).

III. THE FIFTH CIRCUIT SPLITS WITH OTHER CIRCUITS AND APPLIES AN EXCLUSIVE CHECKLIST APPROACH

The Opposition Brief incorrectly states that the Fifth Circuit applies "aggravating factors" nonexclusively as part of a review of all the evidence. (Opp. 14-17).[5] Before *Reeves* (decided by this Court June 12, 2000), the Fifth Circuit rendered its decision in *Barrow v. New Orleans Steamship Assn.*, 10 F.3d 292, 297 (5th Cir. 1994). *Barrow* stated the list of seven factors was "not exclusive." *Barrow*, 10 F.3d at 297. For awhile the "nonexclusive" qualifier remained. In *Ward v. Bechtel Corp.*, 102 F.3d 199, 2002 (5th Cir. 1997), the Fifth Circuit noted the list of factors in *Barrow* is "nonexclusive."

Before *Reeves*, the Fifth Circuit dropped the "nonexclusive" qualifier in *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir. 2000). The Fifth Circuit noted that "Brown clearly proved two of the constructive discharge factors," but upheld summary judgment on Mr. Brown's constructive discharge claim. The Fifth Circuit's *Brown* decision illustrates the way the "factors" work to reject evidence that might lead a reasonable person in the employee's position to feel compelled to resign; applying the "factors" rigidly, the Fifth Circuit opined that Brown's reassignment was irrelevant to his constructive discharge case, since it

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[5] In a backwards way, Respondent seems to agree that use of the checklist as the exclusive aggravating factors would be error under *Reeves* and *Burlington*. Respondent states, "The non-exclusive use of aggravating factors is entirely consistent with [the Court's 'context matters' statement in *Burlington*]." Opp. 22.

did not involve "menial or degrading work" and since he still supervised staff (although fewer people reported to him).[6] *Brown*, 207 F.3d at 782. Though the evidence fulfilled factor five, the Fifth Circuit rejected as qualifying evidence the fact that Brown was reassigned to work for a younger supervisor. To do this, the panel viewed the evidence favorably to the employer, reasoning that the younger supervisor was only three years younger and a personal friend of Brown. *Id.* The Fifth Circuit in *Brown* omitted any reference or hint that the seven factors were "nonexclusive." *Id.* at 782-83.

Post-*Reeves* (January 15, 2000) in *Brown v. Kinney Shoe Co.*, 237 F.3d 556, 566 (5th Cir. 2001), the Fifth Circuit again dropped the "nonexclusive" qualifier. The court listed the seven *Barrow* factors (from the age discrimination case), despite the fact that Lloyd Brown complained of race discrimination. *Brown v. Kinney Shoe Co.*, 237 F.3d at 566.

Next, the Fifth Circuit in an unpublished decision rejected the constructive discharge case of a female medical doctor despite nineteen facts supporting her claim of constructive discharge. *Reznick v. Associated Orthopeadics & Sports Medicine, P.A.*, 104 Fed.Appx. 387 (5th Cir. 2004). The Fifth Circuit (in a sex discrimination case) again listed the seven *Barrow* factors. *Reznick*, 104 Fed.Appx. at 392, and made no indication that the list is "nonexclusive." Evidence on Reznick's list that did not fit one of the seven factors, did not count.

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[6] This wooden rule is contrary to *Burlington N. & Santa Fe Rwy Co.*, 598 U.S. at 67-71 (reassignment may be actionable retaliation, depending on context; even a schedule change may be actionable retaliation).

In *McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007), a race and sex discrimination case, the Fifth Circuit listed six factors, but did not hint that the list was "nonexclusive." In *Aryain v. WalMart Stores*, 534 F.3d 473, 480-81 (5th Cir. 2008) (another non-age discrimination case), the Fifth Circuit listed six factors, but did not hint there was any flexibility or that the list is "nonexclusive."

In the underlying sex discrimination case, *Browning v. Southwest Research Institute*, 288 Fed.Appx. 170, 180 (5th Cir. 2008), the Fifth Circuit listed seven factors, did not hint that the factors were "nonexclusive," and approved the trial court's rulings that refusal to promote and mere discrimination do not count (they are not factors). The Fifth Circuit's discussion of Browning's evidence failed to count her glass ceiling allegations and failed to construe her evidence as "badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation" (citing factor six) where she showed that she had been shown the door, told she was crazy, told that she was not likely to be promoted, and learned a person had been brought in to do her job.

In the Fifth Circuit following *Reeves*, the six or seven factors have *de facto* become inclusive. The Opposition Brief cites two district court cases within the Fifth Circuit rendered in 2008 where the district courts mentioned the list was nonexclusive and then states:

> Thus, there is no doubt that courts within the Fifth Circuit understand that they are not bound to use an exclusive checklist, and will affirm constructive discharge based on "relevant" or "aggravating" factors outside the *Barrow* factors.

(Opp. 17)(emphasis added). There is certainty that some courts within the Fifth Circuit (district courts and the Fifth Circuit itself) do not understand the *Barrow* factors are non-exclusive. The district court in Browning's case listed the seven *Barrow* factors and failed to note the list was non-exclusive. (Pet. 31a). The magistrate, whose opinion was accepted in full by the district court, went on to emphasize that proof of harassment generally would not suffice, as a matter of law, some kind of extreme harassment must be shown:

> "To prevail on a constructive discharge claim, a plaintiff must ultimately show a greater degree of harassment than that required for a hostile work environment claim." (citing authority).

The magistrate's opinion emphasized that bad treatment that falls outside the seven factors on the checklist does not count as evidence for constructive discharge claimant, stating:

> "Discrimination alone, without aggravating factors, is insufficient for a claim of constructive discharge, as is a discriminatory failure to promote."

(Pet. 31a) (citing *Brown v. Kinney Shoe Co.*, 237 F.3d at 566).

The Opposition Brief argues there is no split in the circuits as to the use of "relevant" or "aggravating" factors. Part of this argument, Respondent's argument that the Second, Ninth, Tenth, and District of Columbia Circuits do not use the checklist approach, supports Petitioner's arguments as to these circuits. Respondent's arguments as to the Third and Sixth Circuits, which Petitioner contends side with the Fifth Circuit in applying the checklist exclusively, fail

to note Petitioner's acknowledgement that "[t]hese circuits sometimes state that these factors are not exhaustive." (Pet. 12). While slippage from "non-exclusive" in the Third and Sixth Circuits does not approach what has evolved in the Fifth Circuit, both the Third and Sixth Circuits have issued constructive discharge decisions post-*Reeves* that use the checklist without any hint that the listed factors are not exclusive. See *Stremple v. Nicholson*, No. 06-3807, 2008 WL 3919376, at *3 (3d Cir. Aug. 27, 2008) (slip opinion); *Kinamore v. EPB Elec. Utility*, 92 Fed.Appx. 197, 205 (6th Cir. 2004).

IV. THE BRIEF IN OPPOSITION MISSES PETITIONER'S POINT AS TO *REEVES*

In two ways, the Opposition Brief misses Petitioner's point as to *Reeves*: First, a central theme of the brief in opposition is variously stated as: the Petition is an inappropriate request for this Court to review facts, not law (Opp. 1), "[t]his is a fact-intensive employment case" (Opp. 2), "[e]mployment law cases present factually dense and context-bound scenarios (Opp. 3)", and "[n]othing in these holdings contradicts *Reeves* or calls for an extraordinary exercise of this Court's supervisory power to consider the application of settled law to a dense set of facts." (Opp. 27).

Respondent's argument, that this case involves a "dense set of facts" and that Petitioner seeks to draw the Court into reviewing fact determinations misstates Petitioner's argument and misses a central point about Petitioner's effort to obtain a writ of certiorari in this case. While Respondent has restated the facts in this case, in a way more favorable to Respondent, and has attempted to argue its side of the facts, Petitioner is seeking certiorari on

Question 2 (paraphrased): whether the courts must adhere to *Reeves* standards of reviewing evidence in employment discrimination cases of all kinds; whether the courts or juries resolve disputes where there is a "dense set of facts."

This is what is happening in *Browning*, and other post-*Reeves* constructive discharge cases, particularly in the Fifth Circuit: First, the trial court, then the appellate court, lists some of the facts that the claimant says are sufficient to constitute her *prima facie* evidence of an adverse action – constructive discharge. Then the court, not a jury, decides, as a matter of law, that these facts are not sufficient to warrant a reasonable person to resign. Along the way, the courts, particularly in the Fifth Circuit, use a seven (sometimes six) factor list that literally means some evidence does not count as a matter of law. This is the same kind of judicial assessment of evidence that was happening prior to *Reeves*. (*See* Pet. 22-23). Respondent opposes certiorari by asking this Court to resolve disputed facts, and to do so in its favor.

Second, the Opposition Brief does not squarely address the grounds for certiorari in this matter. This petition seeks guidance on crucial questions of how the lower courts should review evidence in discrimination cases that do not involve outright termination, and whether checklists or guidelines, even non-exclusive ones, impinge upon employee rights under federal discrimination laws. The Opposition Brief only partly addresses this, and only in one sentence, where Respondent assumes that the courts uniformly use non-exclusive checklists:

> The Fifth Circuit's and the other circuits' use of non-exclusive aggravating factors embraces

> *Burlington's* direction regarding context while making use of precedent in other constructive discharge cases to foster a judicially administrable approach to reviewing evidence of constructive discharge. Nothing in that approach remotely warrants certiorari.

Opp. 22 (emphasis added). Without directly acknowledging that any list of factors, even one that is non-exclusive, has the effect of inhibiting a review of the totality and the cumulative effect of the non-movant's evidence, and without acknowledging *Reeves* at all, Respondent is saying that this is convenient for courts and the possibility that some claimants lose their day in court because of this method of review is unimportant.

The Opposition Brief understates the implications of *Reeves* by arguing that the Court's "fundamental concern in *Reeves*" dealt with the split in the circuits as to the need for "pretext-plus" evidence. (Opp. 23-24). While the Court granted certiorari over that issue, addressed and resolved it (*Reeves*, 530 U.S. at 140-49), the Court went on to address "the remaining issue." *Id.* at 149-54. That issue was the manner of assessing evidence utilized by the Fifth Circuit Court of Appeals, which this Court found to be improper.

The Opposition Brief incorrectly suggests that *Burlington* modifies *Reeves* with its language about how "context matters." (Opp. 27). The point of *Burlington* certainly was not to weaken *Reeves* so that judges began weighing facts in context. *Burlington* was talking about relevant evidence, not the role of the judge in sifting and weighing evidence as to context as the Fifth Circuit did in sorting through, dismissing, and minimizing Browning's evidence while crediting Respondent's evidence as a basis for

upholding summary judgment as to constructive discharge, retaliation, and promotion claims.

CONCLUSION

For all the reasons stated herein and in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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